

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(1) THE NATURE OF SPECIFIC PERFORMANCE/801. The remedy by specific performance.

## **SPECIFIC PERFORMANCE (**

### **1. THE REMEDY AND ITS SCOPE**

#### **(1) THE NATURE OF SPECIFIC PERFORMANCE**

##### **801. The remedy by specific performance.**

Specific performance is equitable relief, given by the court to enforce against a defendant the duty of doing what he agreed by contract to do; a plaintiff may, therefore, obtain judgment for specific performance<sup>1</sup> even though there has not, in the strict sense, been any default by the defendant before the issue of the writ<sup>2</sup>.

In early times a court of equity assumed jurisdiction to compel a party to a contract to perform his part of the contract when damages recoverable at law were not an adequate remedy<sup>3</sup>. The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract<sup>4</sup>. The remedy is special and extraordinary in its character, and the court has a discretion either to grant it or to leave the parties to their rights at law<sup>5</sup>. The discretion, however, is not an arbitrary or capricious one; it is to be exercised on fixed principles in accordance with the previous authorities<sup>6</sup>. The judge must exercise his discretion in a judicial manner<sup>7</sup>. If the contract is within the category of contracts of which specific performance will be granted<sup>8</sup>, is valid in form, has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course<sup>9</sup>, even though the judge may think it is very favourable to one party and unfavourable to the other<sup>10</sup>, unless the defendant can rely on one of the recognised equitable defences<sup>11</sup>. Where such a defence is available, the existence of a valid contract is not in itself enough to bring about the interference of the court. The conduct of the plaintiff, such as delay, acquiescence, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it<sup>12</sup>, or the contract itself may, for example on the ground of misdescription, be such that the court will refuse to enforce it<sup>13</sup>.

The jurisdiction to grant specific performance, formerly exercisable only by a court of equity, is now vested in all branches of the High Court<sup>14</sup>, but actions for the specific performance of contracts relating to the sale, exchange or partition of land, or the raising of charges on land, are assigned to the Chancery Division<sup>15</sup>. The relief still retains its character as an equitable remedy, and the old principles of equitable relief apply<sup>16</sup>. Specific performance is now also made available in county courts for the specific performance of any agreement for the sale, purchase or lease of any property where, in the case of a sale or purchase, the purchase money, or, in the case of a lease, the value of the property, does not exceed the county court limit<sup>17</sup> or where the parties agree that a specified county court is to have jurisdiction<sup>18</sup>. District judges have jurisdiction to grant specific performance in resolving small claims referred<sup>19</sup> for arbitration<sup>20</sup>.

The availability of the remedy of specific performance does not of itself import the existence of some equitable interest; all it imports is the inadequacy of the common law remedy of damages in the particular circumstances<sup>21</sup>.

1 Such a judgment is enforceable by proceedings for contempt of court or by other means, eg by appointing another person to do the act: see PARA 965 post; and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 458, 505. An order for specific performance often falls into two parts. The first can be of a declaratory nature, the second containing consequential directions: see *Hasham v Zenab* [1960] AC 316 at 329, [1960] 2 WLR 374 at 377, PC, per Lord Tucker. It is intended to put both parties in the same position as if their respective contractual obligations had been timeously performed by both of them: *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207 at 227, [1985] 2 All ER 966 at 971, HL, per Lord Diplock.

2 *Hasham v Zenab* [1960] AC 316, [1960] 2 WLR 374, PC; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667, where damages 'in addition to' specific performance were awarded for delay after the issue of the writ, even though no decree of specific performance was made because the contract had been completed by the date of the hearing. Damages could not be awarded at law because the writ was premature, having been issued five days before the completion date, at which time there had been no breach of contract. See also *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749.

3 For a short historical introduction to the jurisdiction see EQUITY vol 16(2) (Reissue) PARAS 401-410. See also Fry on Specific Performance (6th Edn) 1 et seq.

4 As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARA 941 et seq. See also PARA 959 et seq post.

5 *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603 at 612, 615, CA. See also the unusual case of *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

6 See *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696 at 710, CA, per Jessel MR; *Bennett v Smith* (1852) 16 Jur 421 (sale of land); *Lamare v Dixon* (1873) LR 6 HL 414 at 423 per Lord Chelmsford.

7 See *Goring v Nash* (1744) 3 Atk 186; *White v Damon* (1802) 7 Ves 30 at 35; *Buckle v Mitchell* (1812) 18 Ves 100 at 111; *Revell v Hussey* (1813) 2 Ball & B 280 at 288; *Conlon v Murray* [1958] NI 17.

8 As to the classes of contracts which are not specifically enforceable see PARA 805 et seq post.

9 *Hall v Warren* (1804) 9 Ves 605 at 608.

10 *Haywood v Cope* (1858) 25 Beav 140. As to refusing specific performance on the ground of hardship see PARA 869 et seq post.

11 As to equitable defences generally see PARA 840 et seq post.

12 *Clowes v Higginson* (1813) 1 Ves & B 524 at 527; *Leech v Schweder* (1874) 9 Ch App 465n at 467n; *Re Terry and White's Contract* (1886) 32 ChD 14 at 27, CA; *Langen & Wind Ltd v Bell* [1972] Ch 685, [1972] 1 All ER 296 (regard had to unpaid vendor's equitable lien). See also PARA 863 et seq post. As to delay and acquiescence see PARA 902 post. See also EQUITY vol 16(2) (Reissue) PARA 909 et seq.

13 See eg *Re Davis and Cavey* (1888) 40 ChD 601 at 606; *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA; *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287. See also PARA 950 et seq post.

14 Supreme Court Act 1981 s 49(1); and see EQUITY vol 16(2) (Reissue) PARAS 496-502.

15 *Ibid* s 61(1), Sch 1 para 1(a): see PARA 906 post. 'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land: Interpretation Act 1978 s 5, Sch 1.

16 See EQUITY vol 16(2) (Reissue) PARA 500.

17 See the County Courts Act 1984 s 23(d); and PARA 907 post.

18 See *ibid* s 24 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 49(3); and by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule); and see COURTS.

19 *Ie* under CCR Ord 19: see COURTS.

20 See *Joyce v Liverpool City Council, Wynne v Liverpool City Council* [1995] 3 All ER 110, [1995] 3 WLR 439, CA.

21 *Re Stapylton Fletcher Ltd, Re Ellis, Son & Vidler Ltd* [1995] 1 All ER 192 at 213, [1994] 1 WLR 1181 at 1203 per Paul Baker J.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **801 The remedy by specific performance**

NOTE 14--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(1) THE NATURE OF SPECIFIC PERFORMANCE/802. Principles governing the granting of equitable relief.

## **802. Principles governing the granting of equitable relief.**

From the nature and origin of equitable jurisdiction, and from its relation to the system of law enforced by the courts of common law, certain rules resulted which, before the fusion of the administration of law and equity, limited and determined the method on which equity acted<sup>1</sup>. The most fundamental principles were (1) that equity followed the law<sup>2</sup>; and (2) that it applied its remedies as supplementary to legal remedies and on the ground of their inadequacy<sup>3</sup>.

Despite some early statements to the contrary<sup>4</sup>, it became established that a court of equity could order specific performance of a contract which was not enforceable at law<sup>5</sup>. The court would not, however, interfere except on the ground that, while relief should in conscience be given, no adequate relief was obtainable at law<sup>6</sup>; hence it would not interfere where adequate damages were recoverable at law, or no damage had in law been suffered, as in the case of an agreement entirely unperformed to grant a loan<sup>7</sup>. A further principle which affected the granting of equitable relief was that equity acted in personam<sup>8</sup>. Since the fusion of the administration of law and equity, the above rules still limit the exercise of the jurisdiction to grant specific performance<sup>9</sup>. This jurisdiction is not restricted to contracts which are executory in the sense of not being intended to be the final instrument regulating the mutual relations of the parties<sup>10</sup>.

1 See generally EQUITY vol 16(2) (Reissue) PARAS 403-405, 551 et seq. See also *Re Scott and Alvarez's Contract*, *Scott v Alvarez* [1895] 2 Ch 603 at 612, 615, CA.

2 Eg equity followed the law as regards limitation of actions but, in practice, actions for specific performance are generally subject to an even shorter period of limitation than at law: see EQUITY vol 16(2) (Reissue) PARA 910 et seq.

3 See EQUITY vol 16(2) (Reissue) PARAS 408, 410. For illustrations see PARA 813 et seq post.

4 *Marquis of Normanby v Duke of Devonshire* (1697) Freem Ch 216; *Bettesworth v Dean and Chapter of St Paul's* (1726) Cas temp King 66 at 69 per Raymond CJ. Cf *Cannel v Buckle* (1724) 2 P Wms 243.

5 Thus a plaintiff would fail at law for a non-essential misdescription, but equity could enforce with compensation (see *Mortlock v Buller* (1804) 10 Ves 292 at 305-306), and similarly where the plaintiff has substantially, but not exactly performed a condition (see *Davis v Hone* (1805) 2 Sch & Lef 341 at 347).

6 Cf *Wright v Bell* (1818) 5 Price 325 (purchase of a debt). See also PARA 813 post.

7 *Rogers v Challis* (1859) 27 Beav 175; *South African Territories v Wallington* [1898] AC 309, HL. Cf *Beech v Ford* (1848) 7 Hare 208 (annuity); *Ashton v Corrigan* (1871) LR 13 Eq 76 (mortgage). See also PARA 834 post.

8 See PARA 820 post; and EQUITY vol 16(2) (Reissue) PARAS 551-552.

9 See further EQUITY vol 16(2) (Reissue) PARAS 496-502.

10 *Australian Hardwoods Pty Ltd v Railways Comr* [1961] 1 All ER 737, [1961] 1 WLR 425, PC. Cf *Wolverhampton and Walsall Rly Co v London and North Western Rly Co* (1873) LR 16 Eq 433 at 439 per Lord Selborne LC.

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Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(1) THE NATURE OF SPECIFIC PERFORMANCE/803. Specific performance and injunctions.

### **803. Specific performance and injunctions.**

It is sometimes appropriate to compel the performance of a contract by the equitable remedy of an injunction rather than by specific performance. In general, an injunction is the proper method of restraining a defendant from committing a breach of a negative obligation<sup>1</sup> or from interfering with the plaintiff's exercise of his rights under the contract<sup>2</sup>, whereas specific performance is the proper method of compelling a defendant to perform a positive obligation of his own under the contract. An injunction may sometimes be used as a method of putting pressure on a defendant to perform his part of a contract which the court would not be prepared to enforce directly by an order for specific performance<sup>3</sup>; for example, the court might grant an injunction to enforce a valid covenant against accepting employment with a competitor<sup>4</sup> contained in a contract of personal service which is not directly enforceable by an action for specific performance<sup>5</sup>. In connection with contracts of personal service, it has been said that the court will exercise this power only where there is an express negative covenant in the agreement, and will not imply such a covenant from a positive obligation to work full-time for the employer<sup>6</sup>, but in connection with other types of contract the absence or presence of an express negative covenant does not appear to have been regarded as significant<sup>7</sup>. The court may also enforce a negative stipulation not to sell goods to other buyers contained in an agreement for the sale of goods, even if that agreement is incapable of being directly enforced by specific performance<sup>8</sup>.

The court may grant an interlocutory injunction in aid of specific performance<sup>9</sup>. For example, it may forbid the removal of the subject matter of the contract from the jurisdiction pending the trial<sup>10</sup> or a disposal of the subject matter by the defendant<sup>11</sup>, although if there is doubt as to the existence or enforceability of the contract the defendant will not be restrained from disposing of the subject matter to a third person if the balance of convenience favours allowing him to do so<sup>12</sup>.

The court has power to grant a mandatory injunction to protect contractual rights, either at the trial or on an interlocutory application<sup>13</sup>. A party who has committed (or, in the case of an interlocutory application, is alleged to have committed) a breach of a negative obligation may be ordered to take action to restore the status quo<sup>14</sup>. A vendor may be ordered to take positive action to prevent serious damage to the property<sup>15</sup>. In certain circumstances, the court may even grant a mandatory injunction directly requiring a party to the contract to perform his contractual obligations, either on an interlocutory application<sup>16</sup> or at the trial of the action<sup>17</sup>.

1 As to the protection of contractual rights by injunction see CIVIL PROCEDURE vol 11 (2009) PARA 448 et seq.

2 *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440.

3 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1005, [1973] 1 WLR 349 at 379, CA, per Sachs LJ (revsd on another ground [1976] 2 Lloyd's Rep 17, HL). See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA.

4 As to the validity of such covenants and other covenants in restraint of trade see COMPETITION vol 18 (2009) PARA 377 et seq.

5 See *Lumley v Wagner* (1852) 1 De GM & G 604, and the other cases cited in PARA 808 note 1 post. See also CIVIL PROCEDURE vol 11 (2009) PARA 460.

6 *Whitwood Chemical Co Ltd v Hardman* [1891] 2 Ch 416, CA. Cf *Wolverhampton and Walsall Rly Co v London and North Western Rly Co* (1873) LR 16 Eq 433 at 440 per Lord Selborne LC. See also *Mutual Reserve Fund Life Association v New York Life Insurance Co and Harvey* (1896) 75 LT 528; *Davis v Foreman* [1894] 3 Ch 654. See also PARA 808 post.

7 See eg *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349, CA (sole agency contract).

8 *Donnell v Bennett* (1883) 22 ChD 835. See also *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, [1974] 1 WLR 576.

9 See CIVIL PROCEDURE vol 11 (2009) PARA 469. As to applications for interlocutory relief in specific performance actions generally see PARA 931 post.

10 *Hart v Herwig* (1873) 8 Ch App 860. Cf the Mareva injunction: *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA; and see CIVIL PROCEDURE vol 11 (2009) PARA 396 et seq.

11 *Preston v Luck* (1884) 27 ChD 497, CA.

12 *Hadley v London Bank of Scotland Ltd* (1865) 3 De GJ & Sm 63, where an injunction was refused because the contract, if established at the trial, would be binding on the third person by reason of the registration by the plaintiff of his claim as a *lis pendens*.

13 As to the circumstances in which mandatory injunctions will be granted see CIVIL PROCEDURE vol 11 (2009) PARA 376 et seq. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664, HL, Lord Mustill said at 366 and at 689 that the claim for a final mandatory injunction was the same as one for specific performance of the obligation to work continuously on the contract; and in *Parker v Camden London Borough Council, Newman v Camden London Borough Council* [1986] Ch 162 at 173, [1985] 2 All ER 141 at 146, CA, Sir John Donaldson MR referred to 'a mandatory injunction in the form of an order for specific performance'. See also *Dance v Welwyn Hatfield District Council* [1990] 3 All ER 572, [1990] 1 WLR 1097, CA; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, [1983] 2 All ER 763, HL (injunction restraining shipowner from exercising his right of withdrawal of vessel from service of charterer said to be indistinguishable from a decree for specific performance of a contract to render services: see PARAS 807-808 post); *Worldwide Dryers Ltd v Warner Howard Ltd* (1982) Times, 9 December.

14 See *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 348, [1970] 3 All ER 402 at 409 per Megarry J.

15 *Strelley v Pearson* (1880) 15 ChD 113.

16 *Smith v Peters* (1875) LR 20 Eq 511, where a vendor was ordered to give a valuer access to premises; *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, [1974] 1 WLR 576, where the defendants were ordered not to withhold supplies of motor fuel from the plaintiffs' filling stations, no alternative sources of supply being available; *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening), The Messiniaki Tolmi* [1982] QB 1248, [1982] 3 All ER 335, CA (cited in CIVIL PROCEDURE vol 12 (2009) PARA 1224), where the buyers of a ship were ordered to sign a notice of readiness in order to enable money secured by a confirmed letter of credit to be paid out before the expiration of the letter. See also *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA.

17 *Puddephatt v Leith* [1916] 1 Ch 200, where a shareholder was ordered to exercise voting rights in accordance with a contractual undertaking (cf *Greenwell v Porter* [1902] 1 Ch 530, where an injunction was granted restraining shareholders from voting contrary to their undertakings); *Bourne v McDonald* [1950] 2 KB 422, [1950] 2 All ER 183, CA, where the defendant was ordered to carry out his contractual undertaking to build a fence in an action commenced in a county court but not within the court's statutory jurisdiction relating to specific performance.

## UPDATE

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Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(1) THE NATURE OF SPECIFIC PERFORMANCE/804. Enforcement of trusts and charges distinguished from specific performance.

#### **804. Enforcement of trusts and charges distinguished from specific performance.**

Actions for the enforcement of trusts differ from actions for specific performance in that trusts are not matters of contract but involve obligations of purely equitable nature to which formerly only the Court of Chancery could have given effect<sup>1</sup>. However, a claim for specific performance may arise in the case of a contract to make a settlement. In such a case, specific performance may be ordered at the suit of another party to the contract, but not at the suit of a trustee or beneficiary who provided no consideration for the contract<sup>2</sup>, although a contract to make a marriage settlement may be enforced by a beneficiary who is issue of the marriage<sup>3</sup>.

Where for good consideration a mortgage or charge has been created in a form not enforceable at law, the court can enforce the charge as an equitable right, but this is not a case of specific performance; in a proper case the court may also enforce the execution of a legal mortgage or charge, and this is a case of specific performance<sup>4</sup>.

1 See EQUITY vol 16(2) (Reissue) PARAS 406, 851 et seq.

2 *Green v Paterson* (1886) 32 ChD 95, CA; *Re Pryce, Nevill v Pryce* [1917] 1 Ch 234; *Re Kay's Settlement, Broadbent v Macnab* [1939] Ch 329, [1939] 1 All ER 245; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898. If, however, a covenant creates a debt enforceable at law or an immediate trust, the beneficiary does not need to claim specific performance and can enforce the covenant directly: *Williamson v Codrington* (1750) 1 Ves Sen 511; *Fletcher v Fletcher* (1844) 4 Hare 67; *Re Cavendish Browne's Settlement Trusts, Horner v Rawle* [1916] WN 341. See *Briggs v Parsloe* [1937] 3 All ER 831. See also PARA 805 post; and EQUITY vol 16(2) (Reissue) PARA 610.

3 *Harvey v Ashley* (1748) 3 Atk 607 at 610; *Hill v Gomme* (1839) 5 M & Cr 250 at 254; *A-G v Jacobs-Smith* [1895] 2 QB 341 at 353, CA; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902 at 915, [1964] 3 All ER 898 at 904. Issue of the marriage are said to be within the marriage consideration.

4 See MORTGAGE vol 32 (2005 Reissue) PARA 345.

### **UPDATE**

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Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(i) Contracts outside the Scope of the Remedy/805. Voluntary promises.

## **(2) GENERAL LIMITS OF JURISDICTION**

### **(i) Contracts outside the Scope of the Remedy**

#### **805. Voluntary promises.**

The court does not enforce specific performance of voluntary promises, whether under seal or not, and a party claiming specific performance must show some consideration<sup>1</sup>. Past consideration does not suffice<sup>2</sup>. This rule applies equally whether the volunteer seeks to enforce a contract or a settlement, except where the legal title has been completed<sup>3</sup>; but the court is not concerned with the adequacy of the consideration and will, if it is otherwise appropriate, enforce a contract entered into for slight or even token consideration<sup>4</sup>. Even if consideration has been given, a benefit to be provided under a contract for a person who did not give consideration cannot as a rule be directly enforced by him in his personal capacity, but the contract may be enforced for his benefit by the party who provided the consideration<sup>5</sup>. A beneficiary under the contract can enforce it if it appears that one of the parties was contracting as trustee on his behalf<sup>6</sup>. A trust cannot be inferred in the absence of any indication that the beneficiary was intended to have a directly enforceable right against the party promising to confer a benefit on him<sup>7</sup>. Contracts can be enforced by a person to whom the rights of the original contracting party pass by assignment, devolution or operation of law<sup>8</sup>.

The court may enforce the performance of a gratuitous promise by an owner of property to confer on the promisee some estate or interest in that property through the principle of equitable or proprietary estoppel<sup>9</sup>. An equitable estoppel will be created if, to the knowledge of the owner, the promisee spends money on the property or otherwise acts to his detriment in reliance on the promise. The principle applies not only where the owner makes an express promise but also where he encourages or creates a belief or expectation that the promisee has or will acquire some estate or interest in the property<sup>10</sup>. In such a case the court has a wide discretion to grant whatever relief is necessary to give effect to the promisee's equity. This may be the grant of a decree of specific performance<sup>11</sup>, but alternatively, where appropriate, the court may order the owner to transfer the property or some interest in it to the promisee<sup>12</sup>, or may make a declaration as to the promisee's rights over the property<sup>13</sup>. An order of one of the latter kinds is not strictly speaking an order for specific performance, since there is no contract to enforce, but it is very similar in its operation, and, as in specific performance in the strict sense, the court may award equitable damages in addition to or in lieu of performance<sup>14</sup>. It has, however, been said that the court can only invoke this principle in order to compel the owner to create or transfer an interest in land or, perhaps, in other forms of property<sup>15</sup>.

A plaintiff seeking to enforce a contract may, of course, make use of the principle of estoppel, whether equitable or by representation, in the normal way by relying on it to bar the defendant from raising some particular defence to the action<sup>16</sup>.

<sup>1</sup> *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 450. See also *Brownsmith v Gilborne* (1727) 2 Stra 738 (voluntary settlement); *Morris v Burroughs* (1737) 1 Atk 399 at 401; *Colman v Sarrel* (1789) 1 Ves 50; *Groves v Groves* (1829) 3 Y & J 163; *Jefferys v Jefferys* (1841) Cr & Ph 138; *Ord v Johnston* (1855) 1 Jur NS 1063; *Walrond v Walrond* (1858) John 18; *Kennedy v May* (1863) 11 WR 358; *Cheale v Kenward* (1858) 3 De G & J 27, where, in an agreement to transfer shares, the assumption of liability by the transferee was sufficient consideration; *Stephens v Green*, *Green v Knight* [1895] 2 Ch 148, CA, where in a postnuptial contract mutual covenants of

husband and wife were sufficient consideration. Cf *Burrows v Greenwood* (1840) 4 Y & C Ex 251 (voluntary contract). See also GIFTS vol 52 (2009) PARA 267.

2 *Robertson v St John* (1786) 2 Bro CC 140, where a promise to renew a lease in consequence of money already laid out was held nudum pactum and specific performance was refused.

3 *Jefferys v Jefferys* (1841) Cr & Ph 138 at 141 per Lord Cottenham LC.

4 *Wycherley v Wycherley* (1763) 2 Eden 175; *Houghton v Lees* (1854) 1 Jur NS 862; *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA (£1 consideration for grant of option).

5 *Keenan v Handley* (1864) 2 De GJ & Sm 283; *Hohler v Aston* [1920] 2 Ch 420; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

6 *Gregory v Williams* (1817) 3 Mer 582; *Gandy v Gandy* (1885) 30 ChD 57, CA; *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; *Harmer v Armstrong* [1934] Ch 65, CA; *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222. See also EQUITY vol 16(2) (Reissue) PARA 609. As to the enforcement of contracts to settle property see *Re Cook's Settlement Trusts*, *Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898; and PARA 804 ante.

7 *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; *Re Schebsman, ex p Official Receiver, Trustee v Cargo Superintendents (London) Ltd and Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA; *Re Miller's Agreement, Uniacke v A-G* [1947] Ch 615, [1947] 2 All ER 78; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

8 *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. As to specific performance at the suit of personal representatives or assignees see PARAS 913-914 post.

9 As to equitable estoppel see EQUITY vol 16(2) (Reissue) PARA 909; ESTOPPEL vol 16(2) (Reissue) PARAS 1089-1091.

10 *Ramsden v Dyson* (1866) LR 1 HL 129 at 170 per Lord Kingsdown; *Chalmers v Pardoe* [1963] 3 All ER 552, [1963] 1 WLR 677, PC; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA; *JT Developments Ltd v Quinn* (1990) 62 P & CR 33, CA. See *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, [1981] 1 All ER 897; *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 1 All ER 923; affd [1982] QB 84, [1981] 3 All ER 577, CA.

11 *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, [1981] 1 All ER 897 (decree of specific performance of the renewal option in the lease).

12 *Duke of Beaufort v Patrick* (1853) 17 Beav 60; *Dillwyn v Llewellyn* (1862) 4 De GJ & F 517; *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA; *Voyce v Voyce* (1991) 62 P & CR 290, CA. See also *Thomas v Thomas* [1956] NZLR 785.

13 *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA. See also *Plimmer v Wellington Corp* (1884) 9 App Cas 699, PC; *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179, DC.

14 *Crabb v Arun District Council (No 2)* (1976) 121 Sol Jo 86, CA, where damages were refused because of the staleness of the claim. As to equitable damages see PARA 959 post.

15 *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 218, CA. Cf, however, *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179, DC, where, on unusual facts, the defendants were ordered to purchase property from the plaintiffs; *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 131, [1981] 3 All ER 577 at 591, CA, per Brandon J.

16 See eg *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA, where the owner was estopped by conduct from denying his wife's authority to contract for the sale of a house; *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, [1981] 1 All ER 897.

## UPDATE

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(i) Contracts outside the Scope of the Remedy/806. Acts the performance of which would require continued supervision.

### **806. Acts the performance of which would require continued supervision.**

It has been held that the court does not enforce the performance of contracts which involve continuous acts and which require the watching and supervision of the court<sup>1</sup>, and that, in particular, the court does not normally order the specific performance of a contract to build or repair<sup>2</sup>. However, this rule is subject to important exceptions<sup>3</sup>, and a decree for specific performance of a contract to build will be made if the following conditions are fulfilled: (1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant is in possession of the land on which the work is contracted to be done<sup>4</sup>.

It is no objection to granting specific performance of an agreement for a lease that the lease is to contain a covenant by the defendant to repair<sup>5</sup>.

More recent cases indicate, however, that the courts are now more ready to enforce contracts requiring supervision. The question is whether the contract sufficiently defines the work to be done, expressly or by implication, to permit the court to make an order which enables the defendant to know what he has to do to comply with it<sup>6</sup>. It seems, however, that the court will not make an order for specific performance which would require the defendant to carry on a business<sup>7</sup>. The court now has a statutory power to order specific performance of a landlord's covenant to repair a dwelling house<sup>8</sup>.

The court has power to direct that if an order for the specific performance of a contract is not complied with, the act required to be done may so far as practicable be done by the party by whom the order or judgment was obtained or some other person appointed by the court, at the cost of the disobedient party<sup>9</sup>.

1 *Pollard v Clayton* (1855) 1 K & J 462 at 481 (contract to supply coal from a particular mine); *Peto v Brighton, Uckfield and Tunbridge Wells Rly Co* (1863) 1 Hem & M 468 (contracts to construct railways); *Blackett v Bates* (1865) 1 Ch App 117 (contract to supply engine power and keep railway line in repair); *Powell Duffryn Steam Coal Co v Taff Vale Rly Co* (1874) 9 Ch App 331 (contract to grant running powers); *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA (contract that porter will perform his duties); *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC (contract for delivery of coal by instalments); *Barnes v City of London Real Property Co* [1918] 2 Ch 18 (agreement by landlord to provide housekeeper); *Joseph v National Magazine Co Ltd* [1959] Ch 14, [1958] 3 All ER 52 (contract to publish article of which exact terms not agreed); and see *Rayner v Stone* (1762) 2 Eden 128; *Phipps v Jackson* (1887) 56 LJ Ch 550; *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch 147; *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277, [1971] 1 WLR 204. Cf *Cooke v Chilcott* (1876) 3 ChD 694 (covenant running with land); and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 171.

2 This rule is not only based on the court's inability to supervise performance, but also on the want of definiteness usually involved in such contracts, and further on the principle that damages are generally an adequate remedy: see *Errington v Aynsly* (1788) 2 Bro CC 341; *Lucas v Commerford* (1790) 3 Bro CC 166; *Hill v Barclay* (1810) 16 Ves 402 (tenant's covenant to repair (as to a landlord's covenant see *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97)); *Kay v Johnson* (1864) 2 Hem & M 118; *Wheatley v Westminster Brymbo Coal Co* (1869) LR 9 Eq 538 (covenant to work a coal mine); *Merchants' Trading Co v Banner* (1871) LR 12 Eq 18 (agreement to alter a ship); *Greenhill v Isle of Wight (Newport Junction) Rly Co* (1871) 23 LT 885. See also *Flint v Brandon* (1803) 8 Ves 159 (covenant to make good a gravel pit); *Booth v Pollard* (1840) 4 Y & C Ex 61; *South Wales Rly Co v Wythes* (1854) 1 K & J 186 (affd 5 De GM & G 880, CA); *Brace v Wehnert* (1858) 25 Beav 348; *Norris v Jackson* (1860) 1 John & H 319. Cf *Soames v Edge* (1860) John 669 (specific performance of contract to accept lease; damages for failure to build); *Middleton v Greenwood* (1864) 2 De GJ & Sm 142. See also *Female Orphans' Asylum v Waterlow* (1868) 16 WR 1102 (agreement to

grant lease); *Wood v Silcock* (1884) 50 LT 251 (preliminary building agreement); and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 454, 464-465.

3 *Wolverhampton Corpn v Emmons* [1901] 1 KB 515, CA. Cf *Mosely v Virgin* (1796) 3 Ves 184.

4 *Molyneux v Richard* [1906] 1 Ch 34; *Carpenters Estates Ltd v Davies* [1940] Ch 160, [1940] 1 All ER 13; *City of London v Nash* (1747) 3 Atk 512. See also *Storer v Great Western Rly Co* (1842) 2 Y & C Ch Cas 48; *Sanderson v Cockermouth and Workington Rly Co* (1849) 11 Beav 497; *Lytton v Great Northern Rly Co* (1856) 2 K & J 394; *Wilson v Furness Rly Co* (1869) LR 9 Eq 28; *Hood v North Eastern Rly Co* (1870) 5 Ch App 525; *Wilson v Northampton and Banbury Junction Rly Co* (1874) 9 Ch App 279 (all cases of accommodation works). Cf *Greene v West Cheshire Rly Co* (1871) LR 13 Eq 44; *Todd & Co v Midland Great Western Rly of Ireland Co* (1881) 9 LR Ir 85; *Fortescue v Lostwithiel and Fowey Rly Co* [1894] 3 Ch 621; *Price v Penzance Corpn* (1845) 4 Hare 506; *Pembroke v Thorpe* (1740) 3 Swan 437n; *Oxford v Provand* (1868) LR 2 PC 135; *Audenshaw UDC v Manchester Corpn* (1907) 71 JP 342, which cases illustrate the same rule. In *South Wales Rly Co v Wythes* (1854) 1 K & J 186 (affd 5 De GM & G 880, CA), specific performance was refused on the ground that damages would be an adequate remedy, the plaintiffs being in a position to have the railway constructed, as the land was in their possession. See also *Cubitt v Smith* (1864) 11 LT 298; *Hepburn v Leather* (1884) 50 LT 660; *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 251, [1970] 3 All ER 326 at 340 per Megarry J.

5 *Paxton v Newton* (1854) 2 Sm & G 437.

6 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 251, [1970] 3 All ER 326 at 340 per Megarry J; *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960 at 969, [1972] 1 WLR 307 at 318 per Megarry J; *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 724, [1973] 1 All ER 90 at 102, HL, per Lord Wilberforce; *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97; *Barrow v Chappell & Co Ltd* [1976] RPC 355 (contract to publish music); *Tito v Waddell (No 2)* [1977] Ch 106 at 321-323, [1977] 3 All ER 129 at 307-309 per Megarry V-C; *Price v Strange* [1978] Ch 337 at 359, [1977] 3 All ER 371 at 385, CA, per Goff LJ; *Gyllenhammar & Partners International Ltd v Sour Brodogrodevna Industrija* [1989] 2 Lloyd's Rep 403; *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513. See also *Ford Sellar Morris Developments Ltd v Grant Seward Ltd* [1989] 2 EGLR 40 at 41-42 per Hoffmann J, where it was said that there is no doubt as to the jurisdiction of the court to order specific performance of a building contract, though an order will not usually be made as it may be difficult to make clear what the defendant has to do, and damages will normally be an adequate remedy; *Tustian v Johnston* [1993] 2 All ER 673; revsd [1993] 3 All ER 534n, CA.

7 *FW Woolworth plc v Charlwood Alliance Properties Ltd* [1987] 1 EGLR 53, applying *Braddon Towers Ltd v International Stores Ltd* (1979) reported in [1987] 1 EGLR 209, and distinguishing *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513.

8 Landlord and Tenant Act 1985 s 17. Quaere whether s 17 applies to an obligation not contained in a deed; see *Gordon v Selico Co Ltd* [1985] 2 EGLR 79; affd [1986] 1 EGLR 71, CA (held that, given a deed, the word 'covenant' extended to implied promises). See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 465.

9 RSC Ord 45 r 8, which is expressed to be without prejudice to the court's power under the Supreme Court Act 1981 s 39 to nominate a person to execute any necessary contract etc and its power to punish the disobedient party for contempt.

## UPDATE

### 801-839 The Remedy and its Scope

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 806 Acts the performance of which would require continued supervision

NOTE 7--See also *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, HL (covenant in a lease of retail premises to keep open for trade during the usual hours of business is not, other than in exceptional circumstances, specifically enforceable).

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).



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### **807. Contracts for personal work or services.**

A judgment for specific performance of a contract for personal work or services is not pronounced, either at the suit of the employer or the employee<sup>1</sup>. The court does not seek to compel persons against their will to maintain continuous personal and confidential relations<sup>2</sup>; but this rule is not absolute and without exception<sup>3</sup>. It has been held that an employer may be restrained from dismissing an employee in breach of contract if there is no loss of confidence between employer and employee<sup>4</sup> or if (at least in a contract of employment to carry out a public duty) the employee has been dismissed in a manner which does not comply with statutory or contractual regulations governing dismissal<sup>5</sup>. No court may, whether by way of an order for specific performance of a contract of employment or an injunction restraining a breach or threatened breach of such a contract, compel an employee to do any work or attend at any place for the doing of any work<sup>6</sup>.

This principle applies not merely to contracts of employment, but to all contracts which involve the rendering of continuous services by one person to another, such as a contract to work a railway line<sup>7</sup>. Contracts of agency, such as that of a shipbroker<sup>8</sup> or an auctioneer<sup>9</sup>, come under the same rule, and a contract of apprenticeship is not enforced against a minor<sup>10</sup>. A time charter, unless it is a charter by demise, is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants and accordingly falls within the principle<sup>11</sup>. One contractual provision which by itself would not be specifically enforceable (because, for example, it requires the performance of personal services) does not, however, prevent the contract as a whole from being specifically enforced, and the court may refuse to let the difficulties of specifically enforcing the obligation to perform personal services outweigh the desirability of the contract as a whole being enforced<sup>12</sup>. The court may order the execution of a service agreement even if it would not specifically enforce the obligations under that agreement<sup>13</sup>. Furthermore, the general rule does not apply so as to prevent a person or group of persons given the right to appoint or nominate a director of a company from exercising such a right, although a company will not be forced to accept as a director a person to whose appointment it has reasonable objections<sup>14</sup>.

1 *Pickering v Bishop of Ely* (1843) 2 Y & C Ch Cas 249; *Fitzpatrick v Nolan* (1851) 1 I Ch R 671 (personal service); *Stocker v Brockelbank* (1851) 3 Mac & G 250; *Stocker v Wedderburn* (1857) 3 K & J 393; *Gillis v M'Ghee* (1861) 13 I Ch R 48 (personal service); *Ogden v Fossick* (1862) 4 De GF & J 426; *Firth v Ridley* (1864) 33 Beav 516; *White v Boby* (1877) 37 LT 652, CA; *Frith v Frith* [1906] AC 254, PC; *Clarke v Price* (1819) 2 Wils Ch 157 (law reporting); *Baldwin v Society for the Diffusion of Useful Knowledge* (1838) 9 Sim 393; *Chaplin v North Western Rly Co* (1862) 5 LT 601; sub nom *Horne v London and North Western Rly Co* 10 WR 170 (personal service); *McGhee v Midlands British Road Services Ltd* [1985] ICR 503 at 508, EAT. Such decrees were made in earlier cases (see *Ball v Coggs* (1710) 1 Bro Parl Cas 140; *East India Co v Vincent* (1740) 2 Atk 83), but later judges have refused to follow these precedents (see the cases cited in this note supra).

2 *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914; *Bainbridge v Smith* (1889) 41 ChD 462 at 464, CA; *De Francesco v Barnum* (1890) 45 ChD 430; *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA; *City and Hackney Health Authority v National Union of Public Employees* [1985] IRLR 252, CA. In *Rigby v Connol* (1880) 14 ChD 482 at 487, Jessel MR seems to confine the principle to cases where no rights of property are involved, but see *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 at 341, [1952] 1 All ER 1175 at 1180, CA, per Denning LJ.

3 *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960 at 969, [1972] 1 WLR 307 at 318 per Megarry J. See also *Regent International Hotels (UK) Ltd v Pageguide Ltd* (1985) Times, 13 May, CA.

4 *Hill v CA Parsons & Co Ltd* [1972] Ch 305, [1971] 3 All ER 1345, CA (where an employer was ordered not to dismiss an employee for failure to join a specified trade union); *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590, [1985] IRLR 203; and see *Jaber v Science and Information Technology Ltd* [1992] BCLC 764. Cf *Chappell v Times Newspapers Ltd* [1975] 2 All ER 233, [1975] 1 WLR 482, CA; *Powell v Brent London Borough Council* [1988] ICR 176, [1987] IRLR 466, CA; *Hughes v London Borough of Southwark* [1988] IRLR 55; *MacPherson v London Borough of Lambeth* [1988] IRLR 470; *Wishart v National Asscn of Citizens' Advice Bureaux Ltd* [1990] ICR 794, [1990] IRLR 393, CA; *Wadcock v London Borough of Brent* [1990] IRLR 223; *Robb v Hammersmith and Fulham London Borough Council* [1991] ICR 514; and see *Alexander v Standard Telephones and Cables plc* [1990] ICR 291, [1990] IRLR 55.

5 *Malloch v Aberdeen Corpn* [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL; *Jones v Lee* [1980] ICR 310, CA. Cf *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448, [1980] 3 All ER 577, CA.

6 Trade Union and Labour Relations (Consolidation) Act 1992 s 236: see EMPLOYMENT vol 41 (2009) PARA 1312; and see EMPLOYMENT vol 40 (2009) PARA 691.

7 *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914. See also *Horne v London and North Western Rly Co* (1861) 10 WR 170, and cf *Pickering v Bishop of Ely* (1843) 2 Y & C Ch Cas 249, where specific performance was refused of a contract to grant an office the holder of which would have had the right and duty of performing work of a confidential character. See also *Warren v Mendy* [1989] 3 All ER 103, [1989] ICR 525, CA.

8 *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404.

9 *Chinnock v Sainsbury* (1860) 6 Jur NS 1318. See also *Bertram v Ball* (1882) 27 Sol Jo 39. Note, however, *Folioshield Ltd v Pleamere Ltd* [1990] 2 EGLR 1, where it was said that specific performance could be granted requiring the defendant to permit the plaintiff to carry out its duties as the defendant's sole letting agent.

10 *De Francesco v Barnum* (1889) 43 ChD 165. Conversely, an order is not made against the master: *Webb v England* (1860) 29 Beav 44. See generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 22.

11 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, [1983] 2 All ER 763, HL; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 All ER 376, [1984] 1 WLR 776, CA; affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL.

12 *Fortescue v Lostwithiel and Fowey Rly Co* [1894] 3 Ch 621; *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960 at 969, [1972] 1 WLR 307 at 317 per Megarry J.

13 *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, [1972] 1 WLR 307. See also *Granville v Betts* (1848) 18 LJ Ch 32; *Wilson v West Hartlepool Rly Co* (1865) 2 De GJ & Sm 475.

14 *British Murac Syndicate Ltd v Alperton Rubber Co Ltd* [1915] 2 Ch 186. See also *Plantations Trust Ltd v Bila (Sumatra) Rubber Lands Ltd* (1916) 85 LJ Ch 801; and COMPANIES vol 14 (2009) PARA 485.

## UPDATE

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### **808. Indirect enforcement of contracts for personal services.**

In certain circumstances, although refusing to order specific performance of a contract for personal services, the court may put pressure on an employee to comply with the contract by granting an injunction restraining him from committing a breach of a negative covenant in the contract which restricts his freedom to take other employment<sup>1</sup>. The court will not generally grant an injunction in the absence of such a covenant, and will not imply a negative covenant from an obligation of the employee to devote the whole of his time to his employer's business<sup>2</sup>, although the question whether the covenant is negative or positive is one of substance rather than form<sup>3</sup>. The court will refuse to grant an injunction in terms which would prevent the employee from accepting other employment of any kind<sup>4</sup>, but may enforce a covenant not to engage in any other occupation during the subsistence of the contract by granting the injunction in a more restricted form<sup>5</sup>. The court will not grant an injunction where the parties owe each other reciprocal obligations of trust and confidence and the defendant has lost confidence in the plaintiff<sup>6</sup>, but the fact that some degree of mutual co-operation is needed does not preclude the court from granting a negative injunction designed to encourage the party in breach to perform his part<sup>7</sup>.

1 *Lumley v Wagner* (1852) 1 De GM & G 604; *Grimston v Cuninghame* [1894] 1 QB 125; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, [1936] 3 All ER 160; *Marco Productions Ltd v Pagola* [1945] KB 111, [1945] 1 All ER 155. See also *Morris v Colman* (1812) 18 Ves 437, as explained in *Clarke v Price* (1819) 2 Wils Ch 157. See generally CIVIL PROCEDURE vol 11 (2009) PARA 460 et seq. An injunction of this kind operates as a form of indirect order for specific performance only if the employer continues to offer employment, but if the employer has accepted the employee's repudiation he may still be entitled to enforce a negative covenant: *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193. In *Evening Standard Co Ltd v Henderson* [1987] ICR 588, [1987] IRLR 64, CA, an interlocutory injunction was granted of a negative term not to work for anyone else during the currency of the contract on the basis of an undertaking by the employer to pay the employee his salary and other contractual benefits throughout the remainder of the contractual period whether he chose to continue working for the employer or not. It was, however, refused in *Provident Financial Group plc v Hayward* [1989] 3 All ER 298, [1989] ICR 160, CA, where the employer was prepared to continue to pay the employee during the remaining period but was not prepared to allow him to continue to work. See also *Warren v Mendy* [1989] 3 All ER 103, [1989] ICR 525, CA; and see *Lotus Cars Ltd v Jaguar Cars Ltd* [1982] LS Gaz R 1214, where an injunction against the defendants was refused where the effect of granting it would have been, in effect, to grant a decree of specific performance of P's contract with the plaintiff, P not being a party to the action. As to the validity of covenants in restraint of trade generally see COMPETITION vol 18 (2009) PARA 377 et seq.

2 *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA; *Mortimer v Beckett* [1920] 1 Ch 571. Cf *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 456, CA, per Lindley LJ.

3 *Wolverhampton and Walsall Rly Co v London and North Western Rly Co* (1873) LR 16 Eq 433 at 440 per Lord Selborne LC; *Davis v Foreman* [1894] 3 Ch 654; *Mutual Reserve Fund Life Association v New York Life Insurance Co and Harvey* (1896) 75 LT 528 at 529, CA, per Lindley LJ. Cf *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA; *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799; *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL.

4 *Ehrman v Bartholomew* [1898] 1 Ch 671; *Palace Theatre Ltd v Clensy and Hackney and Shepherd's Bush Empire Palaces Ltd* (1909) 26 TLR 28, CA; *Chapman v Westerby* [1913] WN 277; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler* [1926] Ch 609.

5 *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, [1936] 3 All ER 160, where a film star was restrained from rendering services in any film or stage production for anyone other than the plaintiffs. Some doubt was cast on this last case in *Warren v Mendy* [1989] 3 All ER 103, [1989] ICR 525, CA, where Nourse LJ, giving the judgment of the court, cited the observation of

Oliver J in *Nichols Advance Vehicle Systems Inc v De Angelis* (21 December 1979, unreported), that it represents the high water mark of the application of *Lumley v Wagner* (1852) 1 De GM & G 604 (cited in note 1 supra). It is not certain whether the statement of Branson J in *Warner Bros Pictures Inc v Nelson* supra at 214 and at 163 that there is no room for the application of the doctrine of restraint of trade in such circumstances is correct: cf *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL.

6 *Page One Records Ltd v Britton (t/a The Troggs)* [1967] 3 All ER 822, [1968] 1 WLR 157.

7 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1005, [1973] 1 WLR 349 at 379, CA, per Sachs LJ; revsd on another ground [1976] 2 Lloyd's Rep 17, HL.

## UPDATE

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### **809. Absence of mutuality.**

The court may refuse to order specific performance on the ground of absence of mutuality; thus it will not as a rule compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligation of the plaintiff will be specifically performed<sup>1</sup>. Lack of mutuality does not deprive the court of jurisdiction to order specific performance, but is a matter to be taken into account by the court in deciding whether to exercise its discretion to order specific performance<sup>2</sup>. The court will not order specific performance at the suit of a plaintiff who is a minor<sup>3</sup>, since the contract cannot be enforced against him<sup>4</sup>. A plaintiff cannot normally obtain a specific performance order to enforce a contract which could not be enforced against himself on the ground that it involves the future performance by him of personal services or of work which is not defined with sufficient precision<sup>5</sup>. A plaintiff may, however, be granted an injunction restraining the defendant from preventing the execution of the contract by the plaintiff, even if the execution involves the performance of work which the plaintiff could not be ordered to perform<sup>6</sup>.

The defence of want of mutuality must be judged on the facts and circumstances as they exist at the date of the hearing<sup>7</sup>. If the work or services required of the plaintiff under the contract have been performed before the hearing, the defendant cannot rely on the defence of want of mutuality, even if the work has in fact been done by the defendant<sup>8</sup>. The fact that at the date of the contract a plaintiff vendor had no title to the property which he contracted to sell does not entitle the defendant to refuse to perform the contract if the plaintiff has acquired title before the date of the hearing and the defendant did not, immediately upon discovering the absence of title, elect to treat the contract as discharged<sup>9</sup>. However, where a contract is illegal, the fact that the illegal part of it has been performed does not entitle the plaintiff to enforce performance of the rest of it<sup>10</sup>.

1 *Price v Strange* [1978] Ch 337 at 367, [1977] 3 All ER 371 at 392, CA, per Buckley LJ.

2 *Price v Strange* [1978] Ch 337 at 359, 370, [1977] 3 All ER 371 at 385, 395, CA.

3 *Flight v Bolland* (1828) 4 Russ 298.

4 *Flight v Bolland* (1828) 4 Russ 298; *Lumley v Ravenscroft* [1895] 1 QB 683, CA.

5 *Hill v Gomme* (1839) 1 Beav 540; *Pickering v Bishop of Ely* (1843) 2 Y & C Ch Cas 249; *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914; *Stocker v Wedderburn* (1857) 3 K & 393; *Ord v Johnston* (1855) 1 Jur NS 1063; *Ogden v Fossick* (1862) 4 De GF & J 426; *Peto v Brighton, Uckfield and Tunbridge Wells Rly Co* (1863) 1 H & M 468.

6 *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440, where an injunction was granted restraining the defendant from interfering with the plaintiff's right to enter on the defendant's land to cut timber.

7 *O'Regan v White* [1919] 2 IR 339; *Kirkland v Bird* (1968) 112 Sol Jo 440 at 441; *Wakeham v Mackenzie* [1968] 2 All ER 783 at 785, [1968] 1 WLR 1175 at 1177; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA. See also *Macaulay v Great Paramount Theatre Ltd* (1921) 22 SR NSW 66 at 74; *JC Williamson Ltd v Lukey* (1931) 45 CLR 282 at 298.

8 *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA, where an order for specific performance was made with an allowance for the cost of work done by the defendant as a set-off against costs. See also *Sutton v Sutton* [1984] Ch 184, [1984] 1 All ER 168 (where plaintiff could not have been ordered to carry out her part of agreement, but carried it out, defendant could not rely on defence of want of mutuality).

9 *Hoggart v Scott* (1830) 1 Russ & M 293; *Eyston v Simonds* (1842) 1 Y & C Ch Cas 608; *Salisbury v Hatcher* (1842) 2 Y & C Ch Cas 54; *Murrell v Goodyear* (1860) 1 De GF & J 432; *Forrer v Nash* (1865) 35 Beav 167; *Brewer v Broadwood* (1882) 22 ChD 105; *Bellamy v Debenham* [1891] 1 Ch 412, CA; *Halkett v Earl of Dudley* [1907] 1 Ch 590; *Stickney v Keeble* [1915] AC 386 at 417, HL, per Lord Parker; *Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452; *Price v Strange* [1978] Ch 337 at 354, 364, [1977] 3 All ER 371 at 381, 389, CA; *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415.

10 *Hope v Hope* (1857) 8 De GM & G 731.

## UPDATE

### 801-839 The Remedy and its Scope

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(i) Contracts outside the Scope of the Remedy/810. Contracts enforceable despite absence of mutuality.

### **810. Contracts enforceable despite absence of mutuality.**

A defendant cannot rely on a want of mutuality caused by his own default; for example, he cannot rely on the fact that his own laches has deprived him of the right to claim specific performance against the plaintiff<sup>1</sup>. A contract by a trustee to purchase trust property can be enforced against him, although it cannot be enforced by him<sup>2</sup>.

Where at the time of the contract a vendor did not have the full interest he agreed to sell, the purchaser can, as a rule, claim a conveyance of such interest as the vendor possessed, with compensation, although the vendor would not have a corresponding right against the purchaser<sup>3</sup>.

The right to rely on want of mutuality as a defence may be waived, for example by standing by and allowing the plaintiff to spend time and money in carrying out his part of the contract<sup>4</sup>.

There is no need for mutuality where the tenant of a dwelling sues his landlord for breach of a repairing covenant<sup>5</sup>.

1 *South Eastern Ry Co v Knett* (1852) 10 Hare 122. See also *Eastern Counties Ry Co v Hawkes* (1855) 5 HL Cas 331, where the defendant's statutory power of compulsory acquisition had expired.

2 *Ex p Lacey* (1802) 6 Ves 625.

3 See PARA 951 post; and SALE OF LAND vol 42 (Reissue) PARA 251 et seq.

4 *Halkett v Earl of Dudley* [1907] 1 Ch 590; *Price v Strange* [1978] Ch 337 at 356, [1977] 3 All ER 371 at 384, CA, per Goff LJ; *Sutton v Sutton* [1984] Ch 184, [1984] 1 All ER 168.

5 See the Landlord and Tenant Act 1985 s 17; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 465.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(i) Contracts outside the Scope of the Remedy/811. Inability to order performance of the whole contract.

### **811. Inability to order performance of the whole contract.**

By a principle which overlaps with that of mutuality, the court will not as a general rule order specific performance of part of a contract unless it can order the performance of the whole contract<sup>1</sup>. This principle does not, however, apply to the grant of an injunction to restrain a breach of the contract<sup>2</sup>, even if that may in practice compel the performance of the contract<sup>3</sup>; and where the contract is to execute a document, specific performance may be ordered even though the court might not be able to order specific performance of some of the obligations created by that document<sup>4</sup>. If the contract, although in form a single contract, is divisible into two or more parts which can be treated as being in substance separate contracts, specific performance can be ordered of one part even if it cannot be ordered of another<sup>5</sup>. Conversely, if two contracts are in form separate but are in substance interdependent, specific performance will not be ordered of one if it cannot be ordered of both<sup>6</sup>. If the contract itself provides for completion in stages, the court may order specific performance of one stage even though it cannot at that time direct performance of a subsequent stage<sup>7</sup>. If the obligations which cannot be enforced are an insubstantial part of the whole contract, the court can grant specific performance of the major part of the contract with damages as compensation for the obligations which cannot be performed<sup>8</sup>; and in cases relating to agreements for the construction of a building and the lease of the completed building the court has ordered specific performance of a lease of the site with damages for failure to erect the building<sup>9</sup>.

1 *Gervais v Edwards* (1842) 2 Dr & War 80; *Stocker v Wedderburn* (1857) 3 K & J 393 at 407; *Kernot v Potter* (1862) 3 De GF & J 447; *Ogden v Fossick* (1862) 4 De GF & J 426; *Merchants Trading Co v Banner* (1871) LR 12 Eq 18; *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA; *Barnes v City of London Real Property Co etc* [1918] 2 Ch 18.

2 *Rigby v Great Western Rly Co* (1846) 15 LJ Ch 266; affd 2 Ph 44.

3 *Dietrichsen v Cabburn* (1846) 2 Ph 52; *Lumley v Wagner* (1852) 1 De GM & G 604. See also the other cases cited in PARA 808 note 1 ante; and *De Mattos v Gibson* (1859) 4 De G & J 276 at 299 per Lord Hatherley LC; *Sevin v Deslandes* (1860) 30 LJ Ch 457; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349, CA (revsd on the question of damages [1976] 2 Lloyd's Rep 17, HL). Cf *Fothergill v Rowland* (1873) LR 17 Eq 132. See CIVIL PROCEDURE vol 11 (2009) PARA 466.

4 *England v Curling* (1844) 8 Beav 129 (partnership agreement); *Paxton v Newton* (1854) 2 Sm & G 437 (lease containing repairing covenants); *Stocker v Wedderburn* (1857) 3 K & J 393 at 403; *Wilson v West Hartlepool Rly Co* (1865) 2 De GJ & Sm 475; *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, [1972] 1 WLR 307 (service agreement).

5 *Wilkinson v Clements* (1872) 8 Ch App 96; *Lowther v Heaver* (1889) 41 ChD 248, CA.

6 *Casamajor v Strobe* (1834) 2 My & K 706 at 722; *Holliday v Lockwood* [1917] 2 Ch 47.

7 *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA; *Langen and Wind Ltd v Bell* [1972] Ch 685, [1972] 1 All ER 296.

8 *Middleton v Greenwood* (1864) 2 De GJ & Sm 142.

9 *Soames v Edge* (1860) John 669; *Kay v Johnson* (1864) 2 Hem & M 118.

### **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(i) Contracts outside the Scope of the Remedy/812. Agreements ancillary to unenforceable principal contract.

### **812. Agreements ancillary to unenforceable principal contract.**

The court does not enforce an agreement if it is merely ancillary to a principal contract which is itself unenforceable; the adjunct must go along with the principal agreement. Thus specific performance of an agreement to execute a bond may be refused where the bond is to secure performance of a contract to execute works, which could not be enforced, the bond being merely ancillary to the works which form the substance of the contract<sup>1</sup>. Similarly, where a person agrees to employ another as broker and also agrees to insert his name as broker in all his advertisements, the court, being unable to order performance of the former, which is the substantial agreement, refuses to enforce the latter<sup>2</sup>.

1 *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA, affg 1 K & J 186. Cf the cases cited in PARA 808 ante, where a negative covenant which was enforced was distinct from the positive contract which was unenforceable.

2 *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/813. Principle as to damages being adequate remedy.

## **(ii) Where Money Payment Adequate or Decree Valueless**

### **813. Principle as to damages being adequate remedy.**

The ground on which a court of equity would interfere to enforce specific performance of a contract was the inadequacy of the remedy at common law, which was by payment of a sum of money as damages<sup>1</sup>; so it follows that the court does not so interfere in cases where a money payment affords an adequate remedy<sup>2</sup>. The principle appears to be the same whether the contract leaves the amount of damages in the event of breach unliquidated, or whether it specifies a sum by way of penalty or liquidated damages<sup>3</sup>. It has been said that the test is now whether it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages<sup>4</sup>.

1 See PARA 802 ante.

2 *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 553; *Adderley v Dixon* (1824) 1 Sim & St 607 at 610 per Leach V-C; *Wilson v Northampton and Banbury Junction Rly Co* (1874) 9 Ch App 279 at 284 per Lord Selborne LC; *Tito v Waddell (No 2)* [1977] Ch 106 at 327, [1977] 3 All ER 129 at 312 per Megarry V-C; *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B, The Golfstraum* [1985] 2 All ER 669 at 673 per Goulding J.

3 See PARAS 814-818 post.

4 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1005, [1973] 1 WLR 349 at 379, CA, per Sachs LJ; revsd on the question of assessment of damages [1976] 2 Lloyd's Rep 17, HL. See also *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 503 (Aust HC), per Windeyer J; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1 at 6, [1982] 3 WLR 315 at 321, HL, per Lord Diplock; *CN Marine Inc v Stena Line A/B and Regie Voor Maritiem Transport, The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, CA; *Chiswell Shipping Ltd v State Bank of India, The World Symphony* [1987] 1 Lloyd's Rep 165.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/814. Adequacy of damages.

### **814. Adequacy of damages.**

The following illustrations may be given of contracts in which the court refuses specific performance on the ground that damages in money would afford a sufficient remedy.

The court as a rule refuses specific performance of a sale of government stock<sup>1</sup>. On the other hand, the court enforces a contract for the sale or purchase of shares in a company<sup>2</sup>, unless there is a free market in the shares, in which event the vendor or purchaser may easily make a substituted contract and be compensated for any difference in price by means of damages<sup>3</sup>. In an action by a company to enforce specific performance of a contract to take up shares in the company which are not fully paid, a decree will normally be granted<sup>4</sup>. The court may also enforce a contract to take up debentures<sup>5</sup>.

The court also refuses specific performance of a contract to sell or purchase chattels which are not specific or ascertained<sup>6</sup> unless there is no alternative source of supply<sup>7</sup>. It may specifically enforce a contract to deliver specific or ascertained chattels<sup>8</sup>, but this power is discretionary and will not be exercised if damages are an adequate remedy<sup>9</sup>. The court will enforce such a contract to deliver chattels if the goods are of so unique or special a character that money compensation is not adequate<sup>10</sup> and where the goods are of such a nature that it would damage the land to remove them, or where there is a contract for the sale of a house and chattels in it, with the furnishings in situ, if damages would not be an adequate remedy<sup>11</sup>. A contract for the sale of a ship may be specifically enforced where the ship is of exceptional value to the plaintiff<sup>12</sup> and it has been said that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself<sup>13</sup>.

Damages may be an adequate remedy even if the chattel which is the subject matter of the contract is not an ordinary article of commerce and substantial delay and loss of profit will be involved in obtaining a substitute<sup>14</sup>. Damages have also been held to be an adequate remedy for breach of a tenant's covenant to repair the demised premises<sup>15</sup>, a covenant to provide a resident porter for a block of flats<sup>16</sup> and a contract to lend money<sup>17</sup>. Where there is doubt, it is for the plaintiff to prove that damages are not an adequate remedy<sup>18</sup>.

Since land may have 'a peculiar and special value' to a purchaser<sup>19</sup>, a claim for specific performance of an agreement to sell or grant an interest in land will not be refused on the ground that damages would be an adequate remedy, even if the interest to be granted is a lease for a short term<sup>20</sup> or a mere contractual licence to enter on land for a temporary purpose<sup>21</sup>.

The principle of mutuality is applicable, so that a vendor of an interest in land, or of other property of such a nature that damages would be an inadequate remedy to the purchaser, may be entitled to an order for specific performance even though damages would be an adequate remedy for the vendor himself<sup>22</sup>. Other contracts for breach of which damages have been held to be an inadequate remedy include a contract for the sale of a patent<sup>23</sup>, a contract under which the defendant agreed to erect buildings on his own land<sup>24</sup>, a contract to pay an annuity to the other contracting party<sup>25</sup>, a contract to grant an annuity to, or confer another benefit on a third person for which any damages recoverable by the plaintiff would be nominal<sup>26</sup>, and a contract for the assignment of a debt<sup>27</sup>.

Damages rather than specific performance are the appropriate remedy if some of the persons entitled to the benefit of an order for specific performance are not before the court, since they might prefer to claim damages rather than enforce the contract<sup>28</sup>.

Damages are prima facie not an adequate remedy if there is doubt whether a judgment for damages will be satisfied<sup>29</sup>.

1 *Cud v Rutter* (1720) 1 P Wms 570; *Cappur v Harris* (1723) Bunb 135; and *Nutbrown v Thornton* (1804) 10 Ves 159 at 161. As to government stock see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1335 et seq. The decisions of Leach V-C in *Doloret v Rothschild* (1824) 1 Sim & St 590 (contract for sale of Neapolitan stock; specific performance granted, and decree for delivery of certificates) and in *Withy v Cottle* (1822) 1 Sim & St 174 (specific performance on vendor's bill or contract for sale of life annuity payable out of dividends of stock) are contrary to the general current of authority; cf *Gardener v Pullen* (1700) 2 Vern 394, where the sale of East India stock was decreed in specie.

2 *Duncuft v Albrecht* (1841) 12 Sim 189; *Cheale v Kenward* (1858) 3 De G & J 27. Cf *Colt v Nettervill* (1725) 2 P Wms 304; *Buxton v Lister* (1746) 3 Atk 383. See further COMPANIES vol 14 (2009) PARA 389; COMPANIES vol 15 (2009) PARA 1715. See also *Langen and Wind Ltd v Bell* [1972] Ch 685, [1972] 1 All ER 296. As to specific performance of a contract to purchase shares see further PARAS 826-828 post.

3 In such cases damages afford an adequate remedy, so that the basis of the court's jurisdiction is gone: see *Re Schwabacher*, and *Stern v Schwabacher*, *Koritschoner's Claim* (1907) 98 LT 127 at 128.

4 *New Brunswick and Canada Rly and Land Co Ltd v Muggeridge* (1859) 4 Drew 686 (not following *Sheffield Gas Consumers' Co v Harrison* (1853) 17 Beav 294); *Oriental Inland Steam Co Ltd v Briggs* (1861) 2 John & H 625 (on appeal 4 De GF & J 191), where specific performance was refused on the facts.

5 Companies Act 1985 s 195: see COMPANIES vol 15 (2009) PARA 1312.

6 *Holroyd v Marshall* (1862) 10 HL Cas 191 at 209, explained in *Re Wait* [1927] 1 Ch 606, CA. See also *Buxton v Lister* (1746) 3 Atk 383 at 384; *Hoare v Dresser* (1859) 7 HL Cas 290 at 317; *Fothergill v Rowland* (1873) LR 17 Eq 132; *Donnell v Bennett* (1883) 22 ChD 835; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC, where specific performance was refused of a contract by a colliery company to deliver coal from its colliery to a steel company for the requirements of the steel company over a term of years; but see *Taylor v Neville* (prior to 1746) cited in 3 Atk at 384, which appears to be wrongly decided. See also *Pollard v Clayton* (1855) 1 K & J 462. Where delivery of the chattels is only part of an otherwise enforceable contract, delivery may be enforced: *Marsh v Milligan* (1857) 3 Jur NS 979.

7 *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, [1974] 1 WLR 576, where an injunction was granted.

8 See the Sale of Goods Act 1979 s 52; *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 at 445; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 305.

9 *Cohen v Roche* [1927] 1 KB 169 (Hepplewhite chairs); *Société des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465, CA; *Eximenco Handels AG v Partrederiet Oro Chief and Levantes Maritime Corpn, The Oro Chief* [1983] 2 Lloyd's Rep 509 (ship).

10 *Falcke v Gray* (1859) 4 Drew 651 (contract for sale of china jars); *Thorn v Public Works Comrs* (1863) 32 Beav 490; see *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (ornate Adam door). In *Hexter v Pearce* [1900] 1 Ch 341, specific performance was granted of a contract relating to an undivided moiety of mineral property. Cf *Burrow v Scammell* (1881) 19 ChD 175. As to the analogous remedy of an order for specific delivery of chattels in cases not involving performance of a contract see EQUITY vol 16(2) (Reissue) PARA 411.

11 *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853.

12 See *Lynn v Chaters* (1837) 2 Keen 521; *Claringbould v Curtis* (1852) 21 LJ Ch 541; *Hart v Herwig* (1873) 8 Ch App 860 at 866; *Batthyany v Bouch* (1881) 4 Asp MLC 380; *Behnke v Bede Shipping Co* [1927] 1 KB 649 at 661; *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening), The Messiniaki Tolmi* [1982] QB 1248, [1982] 3 All ER 335, CA; *Allseas International Management Ltd v Panroy Bulk Transport SA, The Star Gazer and Star Delta* [1985] 1 Lloyd's Rep 370. Cf *Société des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465 at 468, CA, per Lord Edmund-Davies; *CN Marine Inc v Stena Line AB* [1982] 2 Lloyd's Rep 336, CA.

13 *Bristol Airport plc v Powdrill* [1990] Ch 744 at 759, [1990] 2 All ER 493 at 502, CA, per Browne-Wilkinson V-C.

14 *Société des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465, CA (large industrial machine built to order).

15 *City of London v Nash* (1747) 3 Atk 512. See also the cases cited in PARA 806 note 2 ante.

16 *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA; but cf *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513.

17 *Rogers v Challis* (1859) 27 Beav 175, approved in *Larios v Bonany y Gurety* (1873) LR 5 PC 346. See also PARA 834 post. Cf *Hermann v Hodges* (1873) LR 16 Eq 18, where specific performance was ordered of an agreement to execute a legal mortgage as security.

18 *CN Marine Inc v Stena Line AB* [1982] 2 Lloyd's Rep 336, CA.

19 *Adderley v Dixon* (1824) 1 Sim & St 607 at 610. See also *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 478, [1982] 3 All ER 1 at 6, HL, per Lord Diplock.

20 *Lever v Koffler* [1901] 1 Ch 543. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 95.

21 *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA.

22 *Kenney v Wexham* (1822) 6 Madd 355 (sale of an annuity); *Adderley v Dixon* (1824) 1 Sim & St 607 at 612; *Clifford v Turrell* (1841) 1 Y & C Ch Cas 138 at 150 (on appeal (1845) 14 LJ Ch 390); *Cogent v Gibson* (1864) 33 Beav 557 (sale of a patent); *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL (sale of a business). See also *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331 at 376 per Lord St Leonards, where it was said that damages would not be an adequate remedy for a vendor because he would not have divested himself of the estate. The explanation based on the principle of mutuality has been said to be 'perhaps not wholly satisfying': *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B, The Golfstraum* [1985] 2 All ER 669 at 673 per Goulding J.

23 *Cogent v Gibson* (1864) 33 Beav 557.

24 *Wolverhampton Corp'n v Emmons* [1901] 1 QB 515, CA. Cf *South Wales Rly Co v Wythes* (1854) 1 K & J 186 (affd 5 De GM & G 880, CA), where it was held that damages were an adequate remedy as the plaintiffs had powers of compulsory purchase which would enable them to carry out the works themselves.

25 *Swift v Swift* (1841) 3 L Eq R 267.

26 *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

27 *Wright v Bell* (1818) 5 Price 325; *Adderley v Dixon* (1824) 1 Sim & St 607.

28 *Tito v Waddell (No 2)* [1977] Ch 106 at 324, 326, [1977] 3 All ER 129 at 309, 311.

29 *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1006, [1973] 1 WLR 349 at 380, CA, per Sachs LJ (revsd on the question of the assessment of damages [1976] 2 Lloyd's Rep 17, HL). See also *Hodgson v Duce* (1856) 2 Jur NS 1014.

## UPDATE

### 801-839 The Remedy and its Scope

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 814 Adequacy of damages

TEXT AND NOTE 5--1985 Act s 195 now the Companies Act 2006 s 740.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/815. Contract stipulating for payment of money on non-performance.

### **815. Contract stipulating for payment of money on non-performance.**

Where a contract contains a stipulation that in the event of non-performance a certain sum of money is to be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted<sup>1</sup>. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has a choice given to him by the contract to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the second instance, notwithstanding the penal clause, the court enforces performance if the contract is such that without the penal clause it would have been proper for specific performance<sup>2</sup>.

<sup>1</sup> *Howard v Hopkyns* (1742) 2 Atk 371; *Roper v Bartholomew, Butler v Bartholomew* (1823) 12 Price 797; *French v Macale* (1842) 2 Dr & War 269.

<sup>2</sup> *Roper v Bartholomew, Butler v Bartholomew* (1823) 12 Price 797 at 821; *French v Macale* (1842) 2 Dr & War 269; *Coles v Sims* (1854) 5 De GM & G 1. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 126-129, 271-272.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/816. Choice of remedy in case of penalty clause.

### **816. Choice of remedy in case of penalty clause.**

Where a contract contains a penalty clause, the party entitled to performance has his right in law upon the contract for the money payable under the clause, and also his right in equity to specific relief; he can, at his election, obtain either form of relief, but he cannot obtain both<sup>1</sup>. Thus the ordinary provision on a sale of land that in case of default by the purchaser he is to forfeit his deposit and the seller is to be entitled to resell and claim any deficiency as liquidated damages does not exclude a claim for specific performance by the seller<sup>2</sup>.

The court may treat the penal sum as security, and not as an alternative mode of performance, notwithstanding that the obligation is expressed in an alternative form<sup>3</sup>.

Specific performance may also be ordered where the benefit of performance will go to one person and that of the penalty to another<sup>4</sup>.

1 *Fox v Scard* (1863) 33 Beav 327 at 328. See *Gedge v Duke of Montrose* (1857) 5 WR 537 (assignment of lease); *General Accident Assurance Corp v Noel* [1902] 1 KB 377 (injunction).

2 For instances see *Crutchley v Jerningham* (1817) 2 Mer 502 at 506; *Long v Bowring* (1864) 33 Beav 585; and SALE OF LAND vol 42 (Reissue) PARA 237. For other instances of specific performance notwithstanding a penalty clause see *Howard v Hopkyns* (1742) 2 Atk 371; *Jeudwine v Agate* (1829) 3 Sim 129 at 141; *Logan v Wienholt* (1833) 1 Cl & Fin 611, HL; *Butler v Powis* (1845) 2 Coll 156; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA. It is no bar to specific performance that the penalty is by bond: cf *Hobson v Trevor* (1723) 2 P Wms 191; *Clarkson v Edge* (1863) 33 Beav 227; *Roper v Bartholomew*, *Butler v Bartholomew* (1823) 12 Price 797.

3 *Chilliner v Chilliner* (1754) 2 Ves Sen 528 (contract to renew a lease or answer in damages).

4 *French v Macale* (1842) 2 Dr & War 269.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/817. Payment as an alternative to performance.

### **817. Payment as an alternative to performance.**

There are cases where the court holds, on the construction of a contract, that the intention of the parties is that the act may be done by the contracting party or that payment may be made by him of the stipulated amount, so that the contracting party has in effect the option either of doing the act which he has contracted to do or paying the specified sum, the contract being either to do or abstain from doing on payment of the sum in money<sup>1</sup>. The court may treat covenants to perform or to pay as alternative where specific performance would work unreasonable results<sup>2</sup>.

1 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72 at 94. Cf *Astley v Weldon* (1801) 2 Bos & P 346.

2 *Magrane v Archbold* (1813) 1 Dow 107, HL.

### **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(ii) Where Money Payment Adequate or Decree Valueless/818. Where performance would be valueless.

### **818. Where performance would be valueless.**

Specific performance is not decreed if the defendant would be entitled to revoke or dissolve a contract when executed, as in the case of a contract containing an express power of revocation, since it would be idle to do that which might instantly be undone by one of the parties. Instances of the application of this principle are afforded by the refusal to order specific performance of an agreement for a partnership at will<sup>1</sup> or of a contract for a lease which is to contain a proviso for re-entry on breach of a covenant which has already been broken in such a way by the plaintiff as to entitle the defendant to re-enter<sup>2</sup>. Conversely, specific performance has been refused on the ground that performance has become valueless to the defendant<sup>3</sup>.

A contract for the grant of a lease for a term which has expired before the date of the hearing is not specifically enforced<sup>4</sup>. The principle is that equity does nothing in vain<sup>5</sup>, and the court will refuse to order specific performance of a contract whenever the performance of the order would be a waste of time and money<sup>6</sup>. The court is, however, now prepared to grant specific performance of a contract to grant a licence to occupy land for a few days<sup>7</sup>, and in exceptional circumstances it may order the execution of a deed creating an interest for a term which has already expired or is immediately terminable<sup>8</sup>.

1 *Hercy v Birch* (1804) 9 Ves 357; *Sheffield Gas Consumers' Co v Harrison* (1853) 17 Beav 294: see PARA 836 post. Cf *Wheeler v Trotter* (1737) 3 Swan 174n, where specific performance was refused of an agreement by the registrar of a consistory court to delegate his office, such delegation being obviously revocable.

2 *Jones v Jones* (1803) 12 Ves 186; *Gregory v Wilson* (1852) 9 Hare 683; *Swain v Ayres* (1888) 21 QBD 289, CA. It must be clear that the right to forfeit exists.

3 -- v *White* (circa 1709) 3 Swan 108n. See *Parker v Taswell* (1858) 2 De G & J 559.

4 *Western v Perrin* (1814) 3 Ves & B 197; *Nesbitt v Meyer* (1818) 1 Swan 223; *Walters v Northern Coal Mining Co* (1855) 5 De GM & G 629; *De Brassac v Martyn* (1863) 9 LT 287.

5 *New Brunswick and Canada Rly and Land Co Ltd v Muggeridge* (1859) 4 Drew 686 at 699 per Kindersley V-C; and see *Udall v Capri Lighting Ltd (in liquidation)* [1988] QB 907, [1987] 3 All ER 262, CA (a case relating to enforcement of a solicitor's undertaking).

6 *Tito v Waddell (No 2)* [1977] Ch 106 at 326, [1977] 3 All ER 129 at 311.

7 *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA.

8 *Nesbitt v Meyer* (1818) 1 Swan 223 at 226; *Walters v Northern Coal Mining Co* (1855) 5 De GM & G 629 at 638; but there is no reported case in which this has been done.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(iii) Where Performance would be Substantially Impossible/819. Performance substantially impossible.

### **(iii) Where Performance would be Substantially Impossible**

#### **819. Performance substantially impossible.**

A decree of specific performance will not be granted if it would be substantially impossible to carry it out<sup>1</sup>, for example where there is a contract to grant a lease at a rent greater than that which can lawfully be recovered at the time when the contract is due to be performed<sup>2</sup>.

1 *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528.

2 See *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642, where, however, the principle did not apply on the facts of the case and specific performance was granted.

#### **UPDATE**

#### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(iv) Defendant or Subject Matter out of the Jurisdiction/820. Service of writ outside the jurisdiction.

#### **(iv) Defendant or Subject Matter out of the Jurisdiction**

##### **820. Service of writ outside the jurisdiction.**

Equity acts in personam<sup>1</sup>, and cannot therefore pronounce a judgment for specific performance against a defendant who is not personally subject to the jurisdiction of the English courts.

A judgment for specific performance is not generally given against a person who is not capable of being served within the jurisdiction<sup>2</sup>. Service of a writ of summons may, however, be allowed out of the jurisdiction by leave of the court<sup>3</sup> in certain cases, including actions brought to enforce contracts affecting land in<sup>4</sup>, or contracts made in<sup>5</sup>, the jurisdiction, or contracts which by their terms or by implication are to be governed by English law<sup>6</sup>. Where leave is given to serve a writ out of the jurisdiction, judgment for specific performance may be given if a case for it is established<sup>7</sup>.

1 As to this principle see EQUITY vol 16(2) (Reissue) PARAS 551-552. See also CONFLICT OF LAWS.

2 See, however, the anomalous case of *Hart v Herwig* (1873) 8 Ch App 860, where a contract was made abroad for the sale of a foreign ship, and substituted service on the master was allowed when the ship was within the jurisdiction.

3 As to applications for leave see CIVIL PROCEDURE.

4 See RSC Ord 11 r 1(1)(h); and CIVIL PROCEDURE. Cf the similar provisions of CCR Ord 8 r 2(g).

5 See RSC Ord 11 r 1(1)(d)(i); and CIVIL PROCEDURE.

6 See RSC Ord 11 r 1(1)(d)(iii); and CIVIL PROCEDURE.

7 As to the jurisdiction of the English courts to entertain actions relating to contracts wherever made where the parties are effectively before the court (eg where leave has been given to serve the writ out of the jurisdiction) see CONFLICT OF LAWS.

#### **UPDATE**

##### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(iv) Defendant or Subject Matter out of the Jurisdiction/821. Subject matter of contract outside the jurisdiction.

### **821. Subject matter of contract outside the jurisdiction.**

By virtue of the principle that equity acts in personam<sup>1</sup>, the court may enforce a contract for the sale of or other dealing with land or other property outside the jurisdiction against a defendant who is within the jurisdiction<sup>2</sup> or has submitted to it, or who has been properly served out of the jurisdiction<sup>3</sup>. The order can be enforced by committal for contempt or an order for sequestration of the defendant's assets within the jurisdiction<sup>4</sup>. The court will not, however, enforce a contract for the purchase of land out of the jurisdiction against a third person who has bought it from the contractual vendor, even with notice of the prior contract, unless the prior contract is binding on the subsequent purchaser under the *lex situs*<sup>5</sup>. The court ought not to decree specific performance if the dispute between the parties is the subject matter of prior proceedings before a tribunal in the jurisdiction in which the property is situated, or if the order can have no operation without the intervention of a foreign court and would probably be ignored by that court<sup>6</sup>. The court will not order specific performance of a contract relating to foreign land if, under the *lex situs*, the defendant lacks the capacity to make such a contract<sup>7</sup> or if the recognition of the interest created by the contract would be contrary to the law of the *lex situs*<sup>8</sup>.

1 Cf para 820 note 1 ante.

2 *Archer v Preston*, cited in *Earl of Arglasse v Muschamp* (1682) 1 Vern 76; *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; *Lord Cranstown v Johnson* (1796) 3 Ves 170; *Re Courtney, ex p Pollard* (1840) Mont & Ch 239 at 251 per Lord Cottenham LC; *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 40, HL, per Lord Selborne LC; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 943, CA; *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043. See also *Webb v Webb* [1992] 1 All ER 17, [1991] 1 WLR 1410; further proceedings Case C-294/92 [1994] QB 696, [1994] 3 All ER 911, EC; *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] Ch 482, [1986] 1 All ER 653. See EQUITY vol 16(2) (Reissue) PARAS 551-552; and see also CONFLICT OF LAWS.

3 See *Duder v Amsterdamsch Trustees Kantoor* [1902] 2 Ch 132.

4 See *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358 at 364.

5 *Norris v Chambres* (1861) 3 De GF & J 583; *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332. See, however, *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303, where an English company acquired land in Mexico subject to a previous equitable charge which was void under Mexican law, and the charge was held to be enforceable against the company in England after the sale of the land.

6 *Norris v Chambres* (1861) 3 De GF & J 583; *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332.

7 *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129, CA.

8 *Waterhouse v Stansfield* (1852) 10 Hare 254; *Hicks v Powell* (1869) 4 Ch App 741.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(v) The Crown, States and Diplomats/822. The Crown.

## **(v) The Crown, States and Diplomats**

### **822. The Crown.**

Although civil proceedings may be brought against the Crown<sup>1</sup>, where any such relief is sought as might in proceedings between subjects be granted by way of specific performance, the court must not make an order for specific performance but may in lieu make an order declaratory of the rights of the parties<sup>2</sup>. No application for summary judgment for specific performance may be made against the Crown<sup>3</sup>. An order for specific performance can, however, be granted to the Crown<sup>4</sup>.

<sup>1</sup> See CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 102 et seq; and see also CONSTITUTIONAL LAW AND HUMAN RIGHTS.

<sup>2</sup> Crown Proceedings Act 1947 s 21(1) proviso (a): see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) PARA 134. As to the parallel provisions in s 21(1) proviso (a) relating to injunctions see *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85, [1989] 2 All ER 692, HL; further proceedings Case C-213/89[1991] 1 AC 603, [1991] 1 All ER 70, ECJ; cf *M v Home Office* [1994] 1 AC 377, [1993] 3 All ER 537, HL.

<sup>3</sup> Crown Proceedings Act 1947 s 21(1); RSC Ord 77 r 7(1).

<sup>4</sup> See RSC Ord 77 r 7(2).

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(v) The Crown, States and Diplomats/823. States.

### **823. States.**

Relief may not be given against a state by way of an order for specific performance<sup>1</sup> without the written consent of the state concerned<sup>2</sup>, which may be contained in a prior agreement or in a treaty, convention or other international agreement<sup>3</sup>, but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for this purpose<sup>4</sup>.

This immunity applies to any foreign or commonwealth state, including the Sovereign or other head of that state in his public capacity, the government of that state and any department of that government, but does not apply to any entity (a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued<sup>5</sup>.

1 State Immunity Act 1978 s 13(2)(a). See also *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry, Maclaine Watson & Co Ltd v Department of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1990] 2 AC 418; sub nom *Maclaine Watson & Co Ltd v Department of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523, HL; *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019, [1983] 2 All ER 495, CA.

2 State Immunity Act 1978 s 13(3). Any such consent may be expressed so as to apply to a limited extent or generally: s 13(3).

3 Ibid s 17(2).

4 Ibid s 13(3).

5 Ibid s 14(1). A separate entity is immune to the extent specified in s 14(2): see CIVIL PROCEDURE vol 11 (2009) PARA 221 note 3.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(2) GENERAL LIMITS OF JURISDICTION/(v) The Crown, States and Diplomats/824. Diplomats.

## **824. Diplomats.**

A diplomatic agent<sup>1</sup> is immune from civil jurisdiction<sup>2</sup>, with exceptions which include a real action relating to private immovable property situated in the United Kingdom (unless he holds it on behalf of the sending state for the purposes of the mission)<sup>3</sup> and an action relating to any professional or commercial activity exercised by the diplomatic agent in the United Kingdom outside his official functions<sup>4</sup>. Members of the administrative, technical and service staff of a diplomatic mission and consular staff enjoy more limited immunities which, in general, protect them from a specific performance action only if they entered into the contract in the course of their duties<sup>5</sup>.

1 For the meaning of 'diplomatic agent' see the Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 1(e); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 273. The immunity also extends to members of the agent's family forming part of his household if they are not nationals of the United Kingdom and Colonies: see s 2(2), Sch 1 art 37 para 1. As to categories of citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 8 et seq.

2 Ibid Sch 1 art 31 para 1. As to waiver of the immunity see Sch 1 art 32. See INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 274 et seq.

3 Ibid Sch 1 art 31 para 1(a).

4 Ibid Sch 1 art 31 para 1(c). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom.

5 See the Diplomatic Privileges Act 1964 Sch 1 art 37 paras 2, 3; the Consular Relations Act 1968 s 1(1), Sch 1 art 43; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 280-281, 296.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(i) Contracts for the Grant of an Interest in Land/825. In general.

### **(3) APPLICATION TO PARTICULAR CONTRACTS**

#### **(i) Contracts for the Grant of an Interest in Land**

##### **825. In general.**

In general specific performance of a contract relating to land, including a contractual licence<sup>1</sup>, is granted as a matter of course<sup>2</sup>, unless one of the defences discussed below can be established<sup>3</sup>.

1 See *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA.

2 *AMEC Properties Ltd v Planning Research and Systems plc* [1992] BCLC 1149, [1992] 1 EGLR 70, CA, where it was held that the fact that the defendant was an insolvent company was not a basis for refusing specific performance on the ground that this would undermine the statutory scheme for the distribution of the assets of an insolvent company or would cause hardship to the creditors of the insolvent company.

3 See PARA 840 et seq post.

#### **UPDATE**

##### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(ii) Sale of Shares/826. Contracts relating to shares.

## (ii) Sale of Shares

### 826. Contracts relating to shares.

It is the practice of the court to grant specific performance of contracts for the sale of shares in companies, unless they are freely available in the market<sup>1</sup>. This means that specific performance will usually be ordered of a contract for the sale of shares not quoted on the International Stock Exchange<sup>2</sup>. Where, however, all or part of the purchase money is to remain outstanding after the transfer, the court ought not to order specific performance unless the order is in a form which will effectively safeguard the unpaid vendor's equitable lien<sup>3</sup>. Contracts for the sale of shares on the International Stock Exchange are made subject to its rules and practice<sup>4</sup>.

In an order for specific performance of a contract for the sale of shares, any party whose execution of the transfer is required will be ordered to execute it<sup>5</sup>, and directions will be given to ensure that the purchaser is registered as the shareholder<sup>6</sup>.

Summary judgment<sup>7</sup> for specific performance of a contract for the sale of shares can be given<sup>8</sup>. An order for specific performance may be made even if the directors have a power to refuse to register the transferee as a shareholder, unless there is evidence that the directors may exercise that power<sup>9</sup>. The fact that the plaintiff is not the registered owner of shares, but merely the equitable owner, is not a bar to his suing a purchaser for specific performance<sup>10</sup>.

The effect of a specifically enforceable contract for the sale of shares is to transfer the beneficial ownership of the shares immediately to the purchaser<sup>11</sup>. Accordingly, unless the contract otherwise provides, the purchaser becomes entitled to dividends declared after the date of the contract even if the dividend relates back, wholly or in part, to an earlier period<sup>12</sup>, but not to dividends declared before the date of the contract even if paid afterwards<sup>13</sup>. Where the purchaser is beneficially entitled to a dividend payable before completion, the vendor must obtain payment of it and account to the purchaser on completion<sup>14</sup>.

1 *Duncuft v Albrecht* (1841) 12 Sim 189 at 199 per Shadwell V-C; *Re Schwabacher, Stern v Schwabacher, Koritschner's Claim* (1907) 98 LT 127. See also *J Sainsbury plc v O' Connor (Inspector of Taxes)* [1991] STC 318 at 324-325, [1991] 1 WLR 963 at 971-972, CA, per Lloyd LJ; para 814 ante; and COMPANIES. Cf *Bishop v Bonham* [1988] 1 WLR 742, 4 BCC 347, CA.

2 As a consequence of the changes in Stock Exchange organisation flowing from the enactment of the Financial Services Act 1986 the English Stock Exchange has ceased to exist and has been replaced in effect by the International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd: see s 142 (as amended); the Official Listing of Securities (Change of Competent Authority) Regulations 1991, SI 1991/2000; and COMPANIES.

3 *Langen and Wind Ltd v Bell* [1972] Ch 685, [1972] 1 All ER 296, where an order for specific performance was made on condition that the purchasers' solicitors should hold the share certificates as stakeholders until payment in full of the purchase price.

4 *Grissell v Bristowe* (1868) LR 4 CP 36, Ex Ch; *Coles v Bristowe* (1868) 4 Ch App 3; *Cruse v Paine* (1869) 4 Ch App 441; *Nickalls v Merry* (1875) LR 7 HL 530. Note that the rules and practice mentioned in these cases do not represent the current rules and practice.

5 As to the form and execution of the instrument of transfer see the Stock Transfer Acts 1963 and 1982.

6 As to the form of the order see *Evans v Wood* (1867) LR 5 Eq 9; *Paine v Hutchinson* (1868) 3 Ch App 388; 3 Seton's Judgments and Orders (7th Edn) 2209; Court Forms.

7 le under RSC Ord 86: see PARA 926 et seq post.

8 *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688.

9 *Evans v Wood* (1867) LR 5 Eq 9. See also *Poole v Middleton* (1861) 4 LT 631; cf *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561 (registration already refused by directors; no order for specific performance).

10 *Paine v Hutchinson* (1868) 3 Ch App 388; *Loring v Davis* (1886) 32 ChD 625.

11 *Paine v Hutchinson* (1868) 3 Ch App 388 at 390; *Wood Preservation Ltd v Prior* [1969] 1 All ER 364, [1969] 1 WLR 1007, CA. See also *Hawks v McArthur* [1951] 1 All ER 22.

12 *Black v Homersham* (1879) 4 Ex D 24; *Re Wimbush, Richards v Wimbush* [1940] Ch 92, [1940] 1 All ER 229.

13 *Re Kidner, Kidner v Kidner* [1929] 2 Ch 121.

14 *Stevenson v Wilson* 1907 SC 445.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(ii) Sale of Shares/827. Effect of winding up.

### **827. Effect of winding up.**

Any transfer of shares in a company made after the commencement of the winding up of the company by the court is void unless the court otherwise orders<sup>1</sup>. After the commencement of the winding up, the court will not order specific performance of a contract entered into before that event except in remarkable circumstances<sup>2</sup>. It will not order specific performance of a contract entered into after the commencement of the winding up and in ignorance of it<sup>3</sup>. The vendor may, however, obtain an order for an indemnity against calls on the shares after the date of the contract even if specific performance is not available<sup>4</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 700. The winding up is deemed to commence at the time of the presentation of the petition (s 129(2)), unless the company has previously passed a resolution for a voluntary winding up (s 129(1)).

<sup>2</sup> *Sullivan v Henderson* [1973] 1 All ER 48, [1973] 1 WLR 333. But see *Paine v Hutchinson* (1868) 3 Ch App 388.

<sup>3</sup> *Re London, Hamburg and Continental Exchange Bank, Emmerson's Case* (1866) 1 Ch App 433.

<sup>4</sup> See the cases cited in PARA 828 note 2 post.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(ii) Sale of Shares/828. Calls on shares.

### **828. Calls on shares.**

It appears that a call made on the shares before the date of a contract for their sale, being a call of which the purchaser is ignorant, is not a ground for resisting specific performance of the contract<sup>1</sup>. The vendor is entitled to an indemnity against any calls made after the date of the contract and repayment of money already paid on such a call<sup>2</sup>.

<sup>1</sup> See *Hawkins v Maltby* (1867) LR 4 Eq 572 (on appeal 3 Ch App 188); *Hawkins v Maltby* (1868) LR 6 Eq 505 (on appeal (1869) 4 Ch App 200).

<sup>2</sup> *Evans v Wood* (1867) LR 5 Eq 9; *Paine v Hutchinson* (1868) 3 Ch App 388; *Coles v Bristowe* (1868) 4 Ch App 3; *Hawkins v Maltby* (1869) 4 Ch App 200; *Cruse v Paine* (1869) 4 Ch App 441; *Nickalls v Merry* (1875) LR 7 HL 530; *Bowring v Shepherd* (1871) LR 6 QB 309, Ex Ch.

### **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(ii) Sale of Shares/829. Failure by company to redeem or purchase shares.

### **829. Failure by company to redeem or purchase shares.**

Where a company, on or after 15 June 1982<sup>1</sup>, has issued shares on terms that they are or are liable to be redeemed, or has agreed to purchase any of its own shares, the court cannot grant an order for specific performance of the terms of redemption or purchase if the company shows that it is unable to meet the costs of redeeming or purchasing the shares in question out of distributable profits<sup>2</sup>. If, however, the company is wound up and at the commencement of the winding up any of the shares have not been redeemed or purchased, the terms of redemption or purchase may be enforced against the company unless either (1) the terms provided for the redemption or purchase to take place at a date later than that of the commencement of the winding up; or (2) during the period beginning with the date on which the redemption or purchase was to have taken place and ending with the commencement of the winding up the company could not at any time have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased<sup>3</sup>.

<sup>1</sup> I.e. the appointed day for the commencement of the corresponding provisions in the earlier legislation: see the Companies Act 1981 (Commencement No 4) Order 1982, SI 1982/672.

<sup>2</sup> Companies Act 1985 s 178(1), (3).

<sup>3</sup> Ibid s 178(4), (5). See further COMPANIES vol 15 (2009) PARA 1242.

### **UPDATE**

#### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/830. Contracts relating to choses in action and expectant interests.

### (iii) Other Particular Contracts

#### 830. Contracts relating to choses in action and expectant interests.

It is generally not necessary to seek an order for specific performance of a contract to assign for consideration a chose in action, since such a contract will as a rule operate as an equitable assignment of the chose in action and no further action by the assignor will be required to perfect it<sup>1</sup>. The rights of the assignee will therefore be protected by the grant of an injunction or the appointment of a receiver rather than by making an order for specific performance<sup>2</sup>. This principle applies not only to existing choses in action but also to future debts, expectancies and other forms of future property<sup>3</sup>.

A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing<sup>4</sup>, and the assignee under an oral contract for the disposition of such an interest will be entitled to an order for the execution of a disposition in writing<sup>5</sup>. The court will order specific performance of an agreement for the assignment of a chose in action if a formal instrument of assignment or other act is required to make the contract fully effective; thus the court will order specific performance of a contract for the sale of shares<sup>6</sup> or for the assignment of a patent<sup>7</sup> or copyright<sup>8</sup>. In such a case, specific performance may be granted to the vendor even though he only requires the purchase money<sup>9</sup>. A contract to assign an expectancy for consideration will likewise be enforced by an order for specific performance if it is necessary to execute some further instrument to give full effect to the contract<sup>10</sup>. The court will not, however, enforce a voluntary covenant for the assignment of future property<sup>11</sup>.

Certain choses in action are incapable of assignment<sup>12</sup>, and in such cases the question of specific performance does not arise.

1 *Metcalf v Archbishop of York* (1836) 1 My & Cr 547; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL (see in particular at 543-547 per Lord Macnaghten); *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA; *Re Warren, ex p Wheeler v Trustee in Bankruptcy* [1938] Ch 725, [1938] 2 All ER 331, DC. In the case of the assignment of the benefit of a contract, the assignee may of course have to take proceedings for specific performance against the other party to the original contract: see PARA 914 post.

2 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 547, HL, per Lord Macnaghten.

3 *Tailby v Official Receiver* (1888) 13 App Cas 523, HL.

4 See the Law of Property Act 1925 s 53(1)(c); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

5 See *Oughtred v IRC* [1960] AC 206, [1959] 3 All ER 623, HL.

6 See PARA 826 ante.

7 *Bewley v Hancock* (1856) 6 De GM & G 391; *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462; *Worthington Pumping and Engine Co v Moore* (1902) 20 RPC 41.

8 *Thomblason v Black* (1837) 1 Jur 198; *Western Front Ltd v Vestron Inc* [1987] FSR 66. See also *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631.

9 *Withy v Cottle* (1822) 1 Sim & St 174; *Cogent v Gibson* (1864) 33 Beav 557.

10 *Hobson v Trevor* (1723) 2 P Wms 191; *Wethered v Wethered* (1828) 2 Sim 183; *Hyde v White* (1832) 5 Sim 524; *Lyde v Mynn* (1833) 1 My & K 683; *Persse v Persse* (1840) 7 Cl & Fin 279.

11 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697. See also *Meek v Kettlewell* (1842) 1 Hare 464.

12 Eg a bare cause of action: *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL. See CHOSSES IN ACTION vol 13 (2009) PARA 98 et seq.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/831. Separation deeds.

### **831. Separation deeds.**

Specific performance of an executory agreement for present separation<sup>1</sup> between husband and wife<sup>2</sup> may be granted by the court, provided that there is a binding contract for valuable consideration<sup>3</sup>, and provided that the contract neither contains provisions which are void as being against public policy<sup>4</sup> nor is objectionable on the ground of duress or other like grounds<sup>5</sup>.

Provisions in a separation agreement as to the residence of, and contact with, children will not be enforced unless the court is of opinion that it is for the benefit of the child to do so, since where the upbringing of a child is in question the court must regard his welfare as the paramount consideration<sup>6</sup>.

1 As to contracts for separation between husband and wife see generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 423 et seq.

2 The court's jurisdiction in this respect was established in *Wilson v Wilson* (1848) 1 HL Cas 538. See also *Gibbs v Harding* (1870) 5 Ch App 336 (separation deed); *Besant v Wood* (1879) 12 ChD 605; *Hart v Hart* (1881) 18 ChD 670; *Evershed v Evershed* (1882) 46 LT 690 (agreement to compromise).

3 As to what constitutes consideration see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 431.

4 In *Vansittart v Vansittart* (1858) 4 K & J 62 (affd 2 De G & J 249), it was held that, where the agreement was executory, the presence of any unlawful stipulation would be a bar to a decree, whereas in *Hamilton v Hector* (1872) LR 13 Eq 511, where the suit was on a deed, relief by injunction was granted in respect of covenants which were valid, irrespective of void covenants also contained in the deed. As to void provisions see the Matrimonial Causes Act 1973 s 34; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 424 et seq.

5 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 430.

6 See the Children Act 1989 s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 299 et seq. See also *Jump v Jump* (1883) 8 PD 159; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 511. The same principle would, it is submitted, apply in the case of a parental responsibility agreement under the Children Act 1989 s 4(1)(b). As to parental responsibility agreements see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 139.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/832. Arbitration and awards.

### 832. Arbitration and awards.

The court does not enforce the specific performance of agreements to refer to arbitration<sup>1</sup>, although an indirect method of enforcing performance of such an agreement is provided by the Arbitration Act 1950, which gives the court discretion to stay an action in respect of any dispute which the parties have by writing agreed to refer to arbitration<sup>2</sup>.

The performance of an award may, however, be specifically enforced by the judgment of the court if what is ordered by the award is a matter which, if the subject of an agreement, would have been proper for specific performance<sup>3</sup>, and, where a reference has been ordered by the court, the award may be enforced before it has been made a rule of court<sup>4</sup>. Where an action is brought for the specific performance of an award, the defendant may raise such grounds of defence as would be available on general principles in resisting such an action; thus, he may object that the award is invalid in law<sup>5</sup>, is uncertain<sup>6</sup> or is in excess of the arbitrator's authority, or does not fully deal with the matters submitted, or that the agreement to refer the matter to arbitration is not one that the court would enforce because of unfairness, unreasonableness or other like grounds<sup>7</sup>. It seems that a party may not claim specific performance of an award after taking proceedings to have it set aside<sup>8</sup>.

Unless a contrary intention is expressed in it, every arbitration agreement is deemed to contain a provision, where such a provision is applicable to the reference, that the arbitrator or umpire is to have the same power as the High Court to order specific performance of any contract other than one relating to land or any interest in land<sup>9</sup>.

1 *Street v Rigby* (1802) 6 Ves 815; *Gourlay v Duke of Somerset* (1815) 19 Ves 429; *Agar v Macklew* (1825) 2 Sim & St 418; *Gervais v Edwards* (1842) 2 Dr & War 80; *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA. The court may, however, appoint an arbitrator if both parties request it to do so: *Medov Lines SpA v Traelandsfos A/S* [1969] 2 Lloyd's Rep 225. In certain circumstances the High Court has power to appoint an arbitrator or umpire: see the Arbitration Act 1950 s 10 (amended by the Arbitration Act 1979 ss 6(3), (4), 8(3); the Administration of Justice Act 1985 ss 58, 69(5), Sch 9 para 15; and the Courts and Legal Services Act 1990 s 101(1), (2)).

2 See the Arbitration Act 1950 s 4(1); and ARBITRATION vol 2 (2008) PARA 1211. See also *Cheslyn v Dalby* (1836) 2 Y & C Ex 170, which illustrates how refusal to perform an agreement to refer may raise an equity to which the court will give effect.

3 *Reignolds v Latham* (1579) Cary 106; *Norton v Mascall* (1687) 2 Vern 24; *Hall v Hardy* (1733) 3 P Wms 187; *Wood v Griffith* (1818) 1 Swan 43; *Clay v Rufford* (1849) 8 Hare 281; *Peel v Peel* (1869) 17 WR 586. Cf *Thompson v Noel* (1738) 1 Atk 60 at 62. In *Blackett v Bates* (1865) 1 Ch App 117 specific performance was refused on the ground that the order would have involved the enforcement of continuous performance: see PARA 806 ante. As to the effect of part performance of an award see *Norton v Mascall* supra. As to the methods of enforcing an award see *Selby v Whitbread & Co* [1917] 1 KB 736 at 753-754 per McCardie J; and ARBITRATION vol 2 (2008) PARA 1201 et seq.

4 *Wood v Taunton* (1849) 11 Beav 449.

5 *Blundell v Brettargh* (1810) 17 Ves 232. Cf *Norton v Mascall* (1687) 2 Vern 24. As to various grounds of invalidity see ARBITRATION vol 2 (2008) PARA 1201 et seq. An invalidity may be waived: *Hawksworth v Brammall* (1840) 5 My & Cr 281; see ARBITRATION vol 2 (2008) PARA 1201 et seq.

6 *Wakefield v Llanelly Rly and Dock Co* (1865) 3 De GJ & Sm 11.

7 *Nickels v Hancock* (1855) 7 De GM & G 300. Distinguish the unreasonableness of the award itself, if not involving invalidity: see *Wood v Griffith* (1818) 1 Swan 43, where it was held that the parties, having chosen their tribunal, must abide by its decision.

8 *Blackett v Bates* (1865) 1 Ch App 117.

9 Arbitration Act 1950 s 15.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **832 Arbitration and awards**

TEXT AND NOTES 1, 2--1950 Act Pt I (ss 1-34), 1979 Act repealed by Arbitration Act 1996 Sch 4 and substantially replaced by 1996 Act. As to the court's powers to appoint an arbitrator, see 1996 Act ss 16-19, 27 (see ARBITRATION vol 2 (2008) PARA 1226-1228). As to the staying of legal proceedings, see ss 9-11.

TEXT AND NOTE 9--1950 Act s 15 repealed: 1996 Act Sch 4. As to the various remedies available in arbitral proceedings, including specific performance, see now 1996 Act s 48 (see ARBITRATION vol 2 (2008) PARA 1259).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/833. Appointment of a valuer.

### **833. Appointment of a valuer.**

If a contract for sale provides for the purchase price to be fixed by a valuer or valuers to be nominated by the parties and one party prevents the machinery from operating by refusing to nominate a valuer, the court will treat the contract as a contract for sale at a fair and reasonable price<sup>1</sup>. The court will itself determine, on expert evidence, what that price is, and will order specific performance of the contract<sup>2</sup>. In such a case the provision in the contract for ascertainment of the price is regarded as subsidiary and non-essential. If, however, the contract provides for the price to be fixed by a named valuer or someone who has special knowledge relevant to the question of value, the prescribed mode of valuation may be regarded as an essential term and specific performance may be refused if the nominated valuer is unable or unwilling to act<sup>3</sup>.

Where a valuer has been appointed, the court has power to make a mandatory order directing a party to allow the valuer to have access to the property which he is required to value<sup>4</sup>.

1 See SALE OF LAND vol 42 (Reissue) PARA 88; and PARA 852 post.

2 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL, overruling *Milnes v Gery* (1807) 14 Ves 400, *Agar v Macklew* (1825) 2 Sim & St 418, and *Vickers v Vickers* (1867) LR 4 Eq 529. It is possible that the court might alternatively compel the party in default to appoint a valuer: *Sudbrook Trading Estate Ltd v Eggleton* supra at 479 and at 7 per Lord Diplock.

3 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 479, [1982] 3 All ER 1 at 6, HL, per Lord Diplock and at 483-484 and 10 per Lord Fraser of Tullybelton.

4 *Morse v Merest* (1821) 6 Madd 26; *Smith v Peters* (1875) LR 20 Eq 511.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/834. Contracts for the loan or payment of money.

### **834. Contracts for the loan or payment of money.**

It is the general rule that the court will not order specific performance of a contract to pay money<sup>1</sup>. In particular, the court will not normally compel an intended borrower to take or an intended lender to make a loan, whether the loan is secured or unsecured, but will leave the plaintiff to his remedy in damages<sup>2</sup>. There are, however, significant exceptions to this rule<sup>3</sup>. Contracts to lend or pay money have been specifically enforced in the following circumstances:

- 1 (1) if a loan has already been made in consideration of the defendant's promise to execute a mortgage or other security, the court will decree specific performance of the agreement<sup>4</sup>;
- 2 (2) if the agreement to lend is collateral to the main contract and that contract is specifically enforceable, the agreement to lend may also be specifically enforceable<sup>5</sup>;
- 3 (3) if the agreement is for the grant of an annuity<sup>6</sup>;
- 4 (4) if the agreement is for payment to a third person in circumstances where the plaintiff can only recover nominal damages for breach of contract<sup>7</sup>;
- 5 (5) if a person has entered into an indemnity agreement to relieve a debtor by undertaking to discharge the debt on his behalf (and not merely to reimburse the debtor after he has paid the debt), the court will specifically enforce the obligation by ordering the indemnifying party to pay the debt, provided that the debt has become a present and enforceable liability<sup>8</sup>; and similarly a surety is entitled to an order directing the principal debtor to discharge the debt as soon as it has become a present liability<sup>9</sup>;
- 6 (6) if the contract is of such a kind that a purchaser can sue for specific performance (for example a contract for the sale of land), the vendor can also sue for specific performance even though his only claim is for a liquidated sum of money<sup>10</sup>.

By statute, a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance<sup>11</sup>. Specific performance has also been granted of an agreement to surrender tax losses<sup>12</sup>.

1 *Crampton v Varna Rly Co* (1872) 7 Ch App 562.

2 *Rogers v Challis* (1859) 27 Beav 175 (action by potential lender); *Sichel v Mosenthal* (1862) 30 Beav 371 (action by potential borrower); *Larios v Bonany y Gurety* (1873) LR 5 PC 346; *Western Wagon and Property Co v West* [1892] 1 Ch 271 at 275 per Chitty J; *South African Territories Ltd v Wallington* [1898] AC 309, HL; *Loan Investment Corp of Australasia v Bonner* [1970] NZLR 724, PC.

3 See *Loan Investment Corp of Australasia v Bonner* [1970] NZLR 724 at 742, PC, per Sir Garfield Barwick.

4 *Ashton v Corrigan* (1871) LR 13 Eq 76; *Hermann v Hodges* (1873) LR 16 Eq 18.

5 *Starkey v Barton* [1909] 1 Ch 284. Cf *Loan Investment Corp of Australasia v Bonner* [1970] NZLR 724, PC, where a contract which was essentially one of loan was not enforceable.

6 *Clifford v Turrell* (1841) 1 Y & C Ch 138 (on appeal (1845) 14 LJ Ch 390); *Swift v Swift* (1841) 3 I Eq R 267; *Keenan v Handley* (1864) 2 De GJ & S 283; *Beswick v Beswick* [1968] AC 58 at 97, [1967] 2 All ER 1197 at 1218, HL, per Lord Upjohn. See also *Nives v Nives* (1880) 15 ChD 649 (purchase money payable by instalments).

7 *Beswick v Beswick* [1968] AC 58 at 81, [1967] 2 All ER 1197 at 1207, HL, per Lord Hodson, at 101-102 and 1221 per Lord Upjohn, and at 88 and 1212 per Lord Pearce, who expressed the view that on the facts of that case substantial damages could have been awarded. As to damages for breach of a contract to pay money to a third person see *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL.

8 *Re Richardson, ex p Governors of St Thomas's Hospital* [1911] 2 KB 705 at 709-710, CA; *McIntosh v Dalwood (No 4)* (1930) 30 SR NSW 415. Cf *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561 (liability contingent).

9 *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401. Cf *Bradford v Gammon* [1925] Ch 132.

10 *Kenney v Wexham* (1822) 6 Madd 355; *Adderley v Dixon* (1824) 1 Sim & St 607 at 612; *Clifford v Turrell* (1841) 1 Y & C Ch 138 at 150; *Cogent v Gibson* (1864) 33 Beav 557; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. See also *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331 at 376; *Nives v Nives* (1880) 15 ChD 649; *Gorringe v London Improvement Society* [1899] 1 IR 142 at 152; *Starkey v Barton* [1909] 1 Ch 284 at 290; *Turner v Bladin* (1951) 82 CLR 463 at 473.

11 See the Companies Act 1985 s 195; and COMPANIES vol 15 (2009) PARA 1312.

12 *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1.

## UPDATE

### 801-839 The Remedy and its Scope

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 834 Contracts for the loan or payment of money

TEXT AND NOTE 11--1985 Act s 195 now the Companies Act 2006 s 740.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/835. Contract of indemnity.

### **835. Contract of indemnity.**

An ordinary contract of indemnity can be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or, in some cases, to the party to be indemnified<sup>1</sup>.

<sup>1</sup> *Johnston v Salvage Asscn* (1887) 19 QBD 458 at 460, CA, per Lindley LJ; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 at 481-482, CA, per Pickford LJ; *Firma C-Trade SA v Newcastle Protection and Indemnity Asscn, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Asscn (London) Ltd, The Padre Island (No 2)* [1991] 2 AC 1, [1990] 2 All ER 705, HL (where, however, the express provisions of the rules of the protection and indemnity associations concerned precluded the application of the remedy).

### **UPDATE**

#### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/836. Agreements relating to partnerships.

### **836. Agreements relating to partnerships.**

The court does not as a general rule enforce an agreement to form and carry on a partnership<sup>1</sup>, but it does enforce such an agreement by ordering the parties to execute a formal deed where they have actually entered on performance by carrying on the partnership business<sup>2</sup>, and it also enforces a contract for the purchase of a share in a partnership<sup>3</sup>, or for an option to enter into partnership<sup>4</sup>. It seems doubtful whether the court would specifically enforce a contract to execute a deed of partnership as distinguished from a contract to enter into a partnership<sup>5</sup>.

1 *New Brunswick and Canada Rly and Land Co v Muggeridge* (1859) 4 Drew 686 at 697 et seq per Kindersley V-C; *Sichel v Mosenthal* (1862) 30 Beav 371; *Scott v Rayment* (1868) LR 7 Eq 112. Where the proposed partnership is at will, interference by the court would in any event be nugatory, as either party could instantly dissolve the partnership: cf *Hercy v Birch* (1804) 9 Ves 357; *Sheffield Gas Consumers' Co v Harrison* (1853) 17 Beav 294 (partnership to make secret medicines). See also *Vivers v Tuck* (1863) 1 Moo PCCNS 516, where specific performance of a partnership agreement was refused on the ground of hardship.

2 *Hibbert v Hibbert* (1807) cited in *Scott v Rayment* (1868) LR 7 Eq 112; *England v Curling* (1844) 8 Beav 129; *Crowley v O' Sullivan* [1900] 2 IR 478. See also EQUITY vol 16(2) (Reissue) PARA 464.

3 *Dodson v Downey* [1901] 2 Ch 620. The court inserts the term that the purchaser indemnify the vendor against the liabilities of the business: *Dodson v Downey* supra. See also *Charlesworth v Jennings* (1864) 11 LT 439 (misrepresentation); *Homfray v Fothergill* (1866) LR 1 Eq 567.

4 *Lisle v Reeve* [1902] 1 Ch 53 CA; affd sub nom *Reeve v Lisle* [1902] AC 461, HL.

5 See Fry on Specific Performance (6th Edn) 699-700.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/837. Contracts to leave property by will, to settle property or to exercise powers.

### **837. Contracts to leave property by will, to settle property or to exercise powers.**

A contract for good consideration to leave by will ascertainable property<sup>1</sup> to a particular person may be enforced by an order for specific performance as against all persons claiming as volunteers under the person who so agreed<sup>2</sup>. Specific performance is not, however, ordered where the person who entered into the contract was merely acting in exercise of a testamentary power of appointment<sup>3</sup>. An agreement to make ample provision for a person by will is too vague to be enforced<sup>4</sup>; a definite agreement must be proved in order that relief may be granted<sup>5</sup>. If the property in question is an interest in land and the contract is made on or after 27 September 1989, the contract is a complete nullity if the statutory requirements as to form are not complied with<sup>6</sup>.

Specific performance may also be granted of certain contracts to settle property on marriage<sup>7</sup> or to exercise a power to jointure<sup>8</sup>.

1 As to contracts to leave property by will see WILLS vol 50 (2005 Reissue) PARAS 318-319.

2 *Synge v Synge* [1894] 1 QB 466 at 470-471, CA; *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC. See also *Goilmere v Battison* (1682) 1 Vern 48, sub nom *Goylmer v Paddiston* (1682) 2 Vent 353; *Ridley v Ridley* (1865) 34 Beav 478; *Coverdale v Eastwood* (1872) LR 15 Eq 121; *Alderson v Maddison* (1880) 5 Ex D 293 (revsd on the facts (1881) 7 QBD 174, CA, and sub nom *Maddison v Alderson* (1883) 8 App Cas 467, HL); *Re Broadwood, Edwards v Broadwood (No 2)* (1912) 56 Sol Jo 703, CA; *Wakeham v Mackenzie* [1968] 2 All ER 783, [1968] 1 WLR 1175. Cf *Re Gonin* [1979] Ch 16, [1977] 2 All ER 720. As to voluntary contracts see PARA 805 ante.

3 *Re Parkin, Hill v Schwarz* [1892] 3 Ch 510 at 517. As to a covenant not to revoke such a will see *Re Lawley, Zaiser v Lawley* [1902] 2 Ch 799 at 804, 805, CA; *Robinson v Ommamey* (1882) 21 ChD 780; and WILLS vol 50 (2005 Reissue) PARA 319.

4 *Macphail v Torrance* (1909) 25 TLR 810.

5 *Lord Walpole v Lord Orford* (1797) 3 Ves 402, discussed and explained in *Re Oldham, Hadwen v Myles* [1925] Ch 75 at 85, and *Gray v Perpetual Trustee Co* [1928] AC 391 at 400, PC.

6 See the Law of Property (Miscellaneous Provisions) Act 1989 ss 2, 5(3), (4) (which replaced the Law of Property Act 1925 s 40 in relation to contracts made on or after 27 September 1989); and PARA 858 post. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 79.

7 See SETTLEMENTS vol 42 (Reissue) PARA 639.

8 See POWERS vol 36(2) (Reissue) PARA 251.

## **UPDATE**

### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/838. Compulsory purchase.

### **838. Compulsory purchase.**

There are numerous and extensive statutory provisions which enable government departments, local authorities and other public bodies to acquire land compulsorily, and in certain circumstances an owner may require an authority to purchase land from him<sup>1</sup>. When the acquiring authority requires to purchase land, it must give notice, described as a 'notice to treat', to all the persons interested in or having power to sell and convey or release the land so far as known to the acquiring authority after diligent inquiry<sup>2</sup>. The service of a notice to treat creates a relationship analogous to that of vendor and purchaser in that it binds the owner to sell if he is paid compensation and the acquiring authority to buy if good title is shown<sup>3</sup> (subject to any statutory right to withdraw the notice<sup>4</sup>), and both parties have the right to have the compensation assessed by the statutory procedure<sup>5</sup>. However, until the purchase price is agreed by the parties or compensation is assessed there is no contract between them which can be enforced by an order for specific performance, and the original owner remains the equitable as well as legal owner of the property<sup>6</sup>. A notice to treat is thus not registrable as an estate contract<sup>7</sup>. Once the price or compensation has been ascertained, there is a complete agreement which can be enforced by an order for specific performance<sup>8</sup> or, in the case of the acquiring authority, by the payment of compensation into court and the execution of a deed poll vesting the land in itself<sup>9</sup>.

Whether specific performance will be granted after the price or compensation has been agreed or determined will depend on the application of the ordinary rules<sup>10</sup>. The acquiring authority may insist that the owner shows a good title and specific performance will then be granted only on condition that the owner does so<sup>11</sup>. In the case of unregistered land, the owner must execute a conveyance, and it is a defence to an action for the price that no conveyance has been executed<sup>12</sup>. Where a lease is acquired, the acquiring authority must give the usual covenants by an assignee against breach of the covenants in the lease<sup>13</sup>. Interest is payable from the time when a good title is shown or, if title has been accepted before the date when the price is agreed or ascertained, from the latter date<sup>14</sup>. If possession is taken by the acquiring authority at an earlier time interest is payable (in the absence of statutory provision to the contrary) from the date of possession<sup>15</sup>.

1 See generally COMPULSORY ACQUISITION OF LAND.

2 Compulsory Purchase Act 1965 s 5(1). As to the contents of the notice see s 5(2). The period during which a notice to treat has effect is limited by s 5(2A)-(2E) (added by the Planning and Compensation Act 1991 s 67; brought into force with savings by the Planning and Compensation Act 1991 (Commencement No 1 and Transitional Provisions) Order 1991, SI 1991/2067). See also the Lands Clauses Consolidation Act 1845 s 18; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 616. As to the deemed notice to treat where an owner requires an authority to purchase land see COMPULSORY ACQUISITION OF LAND.

3 *Stone v Commercial Rly Co* (1839) 4 My & Cr 122 at 124 per Lord Cottenham LC; *Adams v London and Blackwall Rly Co* (1850) 2 Mac & G 118; *Haynes v Haynes* (1861) 1 Drew & Sm 426 at 450 per Kindersley V-C; *Fotherby v Metropolitan Rly Co* (1866) LR 2 CP 188 at 193; *Tiverton and North Devon Rly Co v Loosemore* (1884) 9 App Cas 480 at 493, 503, 511, HL. See further COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 631.

4 See COMPULSORY ACQUISITION OF LAND.

5 As to the procedure for determining compensation and the assessment of compensation see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 715 et seq.

6 *Regent's Canal Co v Ware* (1857) 23 Beav 575; *Haynes v Haynes* (1861) 1 Dr & Sm 426, where it was held that the doctrine of conversion does not apply before the compensation is ascertained; *London Corpn v Horner* (1914) 111 LT 512, CA. The agreement of compensation 'subject to contract' does not create a contract between the owner and the authority: *Munton v Greater London Council* [1976] 2 All ER 815, [1976] 1 WLR 649, CA.

7 *Capital Investments Ltd v Wednesfield UDC* [1965] Ch 774, [1964] 1 All ER 655.

8 *Regent's Canal Co v Ware* (1857) 23 Beav 575; *Mason v Stokes Bay Rly and Pier Co* (1862) 32 LJ Ch 110; *Harding v Metropolitan Rly Co* (1872) 7 Ch App 154; *Re Cary-Elwes' Contract* [1906] 2 Ch 143. See further COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 651.

9 See the Compulsory Purchase Act 1965 s 9. See also *IRC v Metrolands (Property Finance) Ltd* [1982] 2 All ER 557 at 561, [1982] 1 WLR 341 at 346, HL (deemed notice to treat).

10 *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146 at 150 per Jessel MR.

11 *Gunston v East Gloucestershire Rly Co* (1868) 18 LT 8.

12 *East London Union v Metropolitan Rly Co* (1869) LR 4 Exch 309. Transfers of registered land are executed by the transferee. See generally SALE OF LAND.

13 *Harding v Metropolitan Rly Co* (1872) 7 Ch App 154.

14 *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146.

15 *Inglewood Pulp and Paper Co v New Brunswick Electric Power Commission* [1928] AC 492, PC. Accrued interest is payable on an advance payment on account of compensation: see the Land Compensation Act 1973 s 52A (added by the Planning and Compensation Act 1991 s 63(2)); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 657. As to the power of the Lands Tribunal to direct that interest be paid from the date of the award or previous entry see COMPULSORY ACQUISITION OF LAND.

## UPDATE

### 801-839 The Remedy and its Scope

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 838 Compulsory purchase

NOTE 2--Compulsory Purchase Act 1965 s 5(2A), (2D) amended: SI 2009/1307.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/1. THE REMEDY AND ITS SCOPE/(3) APPLICATION TO PARTICULAR CONTRACTS/(iii) Other Particular Contracts/839. Doctor's duty of disclosure.

### **839. Doctor's duty of disclosure.**

A doctor is under a duty to answer his patient's questions as to the treatment proposed<sup>1</sup>, and he may be under a like duty in respect of treatment that has already been given<sup>2</sup>. It has been suggested that if a patient is refused information to which he is entitled, he may be able to bring an action claiming specific performance of the duty to inform<sup>3</sup>.

<sup>1</sup> See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, [1985] 1 All ER 643, HL.

<sup>2</sup> See *Lee v South West Thames Regional Health Authority* [1985] 2 All ER 385 at 389-390, [1985] 1 WLR 845 at 850-851, CA.

<sup>3</sup> See *Lee v South West Thames Regional Health Authority* [1985] 2 All ER 385 at 390, [1985] 1 WLR 845 at 851, CA, per Sir John Donaldson MR (giving the judgment of the court).

### **UPDATE**

#### **801-839 The Remedy and its Scope**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(1) IN GENERAL/840. Need for definite concluded contract.

## 2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE

### (1) IN GENERAL

#### 840. Need for definite concluded contract.

Where it is sought to enforce specific performance of a contract<sup>1</sup>, the court must be satisfied (1) that there is a concluded contract<sup>2</sup> which would be binding at law if all proper formalities had been observed<sup>3</sup>, and in particular that the parties have agreed, expressly or impliedly<sup>4</sup>, on all the essential terms of the contract; and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract<sup>5</sup>.

1 It has been questioned what is included in the term 'contract'. A judge's order made by consent is from many aspects a contract, with further elements added by reason of the order of the court (see *Wentworth v Bullen* (1829) 9 B & C 840; *Lievesley v Gilmore* (1866) LR 1 CP 570; *Conolan v Leyland* (1884) 27 ChD 632), but specific performance of such an order was refused in *Thames Iron Works Co v Patent Derrick Co* (1860) 1 John & H 93 by Page Wood V-C, it being the order of another court and providing its own method of enforcement. In *Caton v Caton* (1867) LR 2 HL 127, the House of Lords differed in opinion as to whether instructions for a settlement were a contract for a settlement or instructions for a contract. A recital in a deed may be evidence of a contract: *Wilson v Keating* (1859) 4 De G & J 588 (affg 27 Beav 121), where the transferee of shares was held bound to pay on a contract evidenced by a transfer, even though he was a mere nominee.

2 As to contracts not concluded see PARAS 842-843 post.

3 See CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

4 Lack of agreement may result eg by reason of misrepresentation (see PARA 875 post), mistake (see PARA 876 post) or defects in the subject matter of the contract (see PARAS 877-878 post).

5 See PARA 844 et seq post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(1) IN GENERAL/841. Grounds for refusing specific performance.

#### **841. Grounds for refusing specific performance.**

The grounds on which specific performance will be refused do not fall into rigid categories. There is a general jurisdiction to deny specific performance if the court, on the particular facts, considers it just to do so<sup>1</sup>. The most familiar specific grounds are as follows.

The legal incapacity of the defendant to bind himself by contract is a defence to an action for specific performance. What constitutes incapacity in various cases is discussed elsewhere in this work<sup>2</sup>. Even where at the time of the contract the defendant was possessed of legal capacity to contract, he may by supervening causes have become incapable in law of performing what he has contracted to do, and on this ground an action for specific performance may fail<sup>3</sup>.

Specific performance will not be granted if the contract is illegal<sup>4</sup> or oppressive<sup>5</sup>, if the plaintiff has failed to perform conditions of the contract<sup>6</sup> or done acts amounting to a repudiation of the contract<sup>7</sup> or been guilty of undue delay in performing his part of the contract<sup>8</sup>, if it has become impossible for the defendant to perform the contract<sup>9</sup>, if the contract has been rescinded or varied<sup>10</sup>, or if it is contrary to public policy to order performance<sup>11</sup>.

1 *Conlon v Murray* [1958] NI 17.

2 See generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq; CONTRACT vol 9(1) (Reissue) PARA 630. As to incapacity in specified cases see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 10 et seq; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1232; MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq. See also COMPANIES.

3 See note 2 supra; and cf *Cowper v Harmer* (1887) 57 LJ Ch 460 (vesting order under trustee legislation).

4 As to illegality see PARA 859 et seq post.

5 As to oppressiveness see PARA 863 et seq post.

6 As to non-performance see PARA 879 et seq post.

7 As to repudiation see PARAS 889-890 post.

8 As to lapse of time see PARA 899 et seq post.

9 As to impossibility see PARAS 892-893 post.

10 As to rescission or variation see PARA 894 et seq post.

11 As to public policy see PARA 905 post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(2) CONTRACT NOT CONCLUDED/842. Factors determining a concluded contract.

## **(2) CONTRACT NOT CONCLUDED**

### **842. Factors determining a concluded contract.**

The court will specifically enforce a contract only if that contract would have been binding at law<sup>1</sup> had all proper formalities been observed<sup>2</sup>. At one time the Court of Chancery would refuse specific performance if there was any doubt as to whether there was a binding contract, leaving the parties to their rights at common law<sup>3</sup>. Since the fusion of the administration of law and equity, the court will decide at the same hearing whether the contract is binding and whether it should be specifically enforced<sup>4</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 629 et seq; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 27 et seq; SALE OF LAND vol 42 (Reissue) PARA 23 et seq.

2 For example, a contract for the sale of land must be in writing and signed by or on behalf of each party to the contract: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 858 post; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 79.

3 *Huddleston v Briscoe* (1805) 11 Ves 583; *Stratford v Bosworth* (1813) 2 Ves & B 341; *Skelton v Cole* (1857) 1 De G & J 587.

4 See the Supreme Court Act 1981 s 49(2); and cf *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA.

## **UPDATE**

### **842 Factors determining a concluded contract**

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(2) CONTRACT NOT CONCLUDED/843.  
Representations inducing conduct.

### **843. Representations inducing conduct.**

One party may make a representation to another with the object of inducing him to act in a certain way. The other does so. In certain cases the court will compel the representor to perform the letter of his representation even though there is no binding oral contract because of the absence of valuable consideration.

The circumstances in which the court will intervene are still not clear. Recent authorities suggest that the equitable doctrine of proprietary estoppel<sup>1</sup> is directed to ascertaining, in particular individual circumstances, whether one party could be permitted to deny the validity of an agreement which, knowingly or unknowingly, he has allowed another to assume to be a valid agreement<sup>2</sup>. For that reason the true owner of land may not be allowed to assert title against another who, to his knowledge, acts to his detriment in the belief that he has entered into a valid contract to buy the land from the owner<sup>3</sup>. Indeed, the courts appear to be ready specifically to enforce such an agreement where, having regard to the previous dealings between the parties, it would be inequitable not to do so. To establish such inequity it is not certain whether it is necessary to show detriment<sup>4</sup>.

1 For the formative cases on equitable proprietary estoppel see *Huning v Ferrers* (1710) Gilb Ch 85; *Savage v Foster* (1723) 9 Mod Rep 35; *Stiles v Cowper* (1748) 3 Atk 692; *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Ramsden v Dyson* (1866) LR 1 HL 129; *Willmott v Barber* (1880) 15 ChD 96; *Plimmer v Wellington Corp'n* (1884) 9 App Cas 699, PC; *Chalmers v Pardoe* [1963] 3 All ER 552, [1963] 1 WLR 677, PC. See also PARA 802 ante; and ESTOPPEL vol 16(2) (Reissue) PARA 1089.

2 See generally *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179, DC; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, [1981] 1 All ER 897; *Coombes v Smith* [1986] 1 WLR 808; *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd*, *Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237, [1989] 2 All ER 655; *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113, PC. Cf *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA; and contrast *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, CA.

3 *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.

4 This was said not to be necessary in *Greasley v Cooke* [1980] 3 All ER 710 at 713, [1980] 1 WLR 1306 at 1311, CA, per Lord Denning MR; and in *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd*, *The Post Chaser* [1982] 1 All ER 19 at 25-27 per Robert Goff J. Contra *Greasley v Cooke* supra at 715 and at 1313-1314 per Dunn LJ. See also *Christian v Christian* (1981) 131 NLJ 43, CA; *Bostock v Bryant* (1990) 61 P & CR 23, CA.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(3) CONTRACT CONCLUDED AT LAW; UNCERTAINTY IN EQUITY/(i) In general/844. Introduction.

### **(3) CONTRACT CONCLUDED AT LAW; UNCERTAINTY IN EQUITY**

#### **(i) In general**

##### **844. Introduction.**

Before the court will order specific performance of a contract it must be satisfied that there is a binding contract at law, that all formalities have been observed, and also that all the terms of the contract are sufficiently precise so that the court can order and supervise the exact performance of the contract<sup>1</sup>. A contract may be certain at law and yet be too uncertain to be enforced in equity<sup>2</sup>.

<sup>1</sup> See *Waring & Gillow Ltd v Thompson* (1912) 29 TLR 154, CA; *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280 (administrator purported to enter into a contract for the sale of land on behalf of himself and his co-administrator, who never ratified the contract; purchaser refused specific performance against administrator); *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1981] 3 All ER 105, CA (option to purchase at price to be fixed by valuers nominated by parties; one party refused to appoint valuer; no concluded contract); *revsd* [1983] 1 AC 444, [1982] 3 All ER 1, HL, on the ground that there was on its true construction a complete contract for a sale at a fair and reasonable price, and the court would substitute its own machinery for ascertaining the value of the property for the agreed machinery which had broken down. Cf *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA; *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129.

<sup>2</sup> *Buxton v Lister* (1746) 3 Atk 383 at 386 per Lord Hardwicke LC; *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA.



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**845. Time at which completeness and certainty are determined.**

Whether a contract is sufficiently certain must be determined at the commencement of the action<sup>1</sup> since it is at that time that non-performance must be justified<sup>2</sup>. However specific performance is ordered even if the contract is incomplete at that date if the defect is such that it can be remedied or compensated<sup>3</sup>, or where a term which is not then ascertained is capable of being ascertained by the court<sup>4</sup>.

1 *Adams v Broke* (1842) 1 Y & C Ch Cas 627; *Shardlow v Cotterell* (1881) 20 ChD 90, CA (revsg 18 ChD 280).

2 *Right d Fisher v Cuthell* (1804) 5 East 491.

3 *Lord Kensington v Phillips* (1817) 5 Dow 61, HL; *Pritchard v Ovey* (1820) 1 Jac & W 396; *Soames v Edge* (1860) John 669; *Norris v Jackson* (1860) 1 John & H 319; *Middleton v Greenwood* (1864) 2 De GJ & Sm 142. As to specific performance with compensation see PARA 948 et seq post.

4 *Owen v Thomas* (1834) 3 My & K 353; *Walker v Eastern Counties Rly Co* (1848) 6 Hare 594; *Monro v Taylor* (1848) 8 Hare 51; *Pickles v Sutcliffe* [1902] WN 200; and see PARA 848 et seq post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(3) CONTRACT CONCLUDED AT LAW; UNCERTAINTY IN EQUITY/(i) In general/846. Effect of partial performance on uncertainty.

#### **846. Effect of partial performance on uncertainty.**

A contract may be challenged on the ground that its terms are too uncertain to be enforced in equity. Nonetheless the court will be anxious to enforce the contract if there has been partial performance of its terms from which the party seeking to resist the enforcement has derived a benefit, and the circumstances are such that the plaintiff can be fully compensated only by an order of specific performance<sup>1</sup>.

<sup>1</sup> See *Parker v Taswell* (1858) 2 De G & J 559 at 571; *Oxford v Provan* (1868) LR 2 PC 135 at 149-150; *Hart v Hart* (1881) 18 ChD 670 at 685; *Sanderson v Cockermouth and Workington Rly Co* (1849) 11 Beav 497 (affd (1850) 2 H & Tw 327), followed in *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA, where a railway company, having obtained possession under a grant, was held bound to permit the making of the necessary accommodation works. See also *Waring and Gillow Ltd v Thompson* (1912) 29 TLR 154 at 156, CA (proposals to found new company).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(3) CONTRACT CONCLUDED AT LAW; UNCERTAINTY IN EQUITY/(i) In general/847. Effect of fraud.

#### **847. Effect of fraud.**

The court will be reluctant to deny specific performance on the ground of uncertainty if the contract was induced by the defendant's fraud<sup>1</sup>.

<sup>1</sup> *Chattock v Muller* (1878) 8 ChD 177, where there was an agreement by which A promised to grant a portion of an estate on purchase to B in consideration of B not competing at the sale. An inquiry was directed to ascertain the boundaries; apparently, if unascertainable, A would be ordered to convey the whole. Cf *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951, where there was an agreement by the agents of A and B at an auction that B's agent should bid and A's agent should refrain and that B, if his agent were successful, would divide the land according to a certain formula, which, however, left certain details to be agreed later. The agreement was held to be too vague to be specifically enforced, but a declaration was made that B should hold as trustee for A and B jointly. The suggestion of Malins V-C in *Chattock v Muller* supra that the defendant could become bound to hand over the whole property to the plaintiff at the price which he paid for it was not followed. As to the formal requirements which must now be satisfied in order to enforce a contract for the sale of land see the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 858 post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(3) CONTRACT CONCLUDED AT LAW; UNCERTAINTY IN EQUITY/(ii) Uncertainty as to General Terms, Subject Matter or Parties/848. Uncertainty in terms as a valid defence.

## (ii) Uncertainty as to General Terms, Subject Matter or Parties

### 848. Uncertainty in terms as a valid defence.

The court does not as a rule enforce specific performance of an agreement unless its terms are certain and unambiguous so that the obligations of the parties are clearly ascertained<sup>1</sup>. A term may be void for uncertainty because it is devoid of meaning or because a variety of meanings can be given to it and it is impossible to say which was intended<sup>2</sup>; but the court should not hold a provision void for uncertainty unless the contract provides no means to enable the court to resolve the ambiguity<sup>3</sup>. The court is reluctant to hold void any contractual provision which was intended to have legal effect<sup>4</sup>. Consequently specific performance is granted when there is such a degree of certainty as is reasonably required in the circumstances<sup>5</sup>; or the original uncertainty has been removed by a subsequent election<sup>6</sup> or by a course of dealing between the parties<sup>7</sup>; or if the term is ancillary or collateral<sup>8</sup>; or by terms reasonably implied in law<sup>9</sup>. The use of the phrase 'et cetera' does not render a contract too uncertain if it is sufficiently plain from the context what is included in the phrase<sup>10</sup>.

1 *Douglas v Baynes* [1908] AC 477 at 485, PC; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 2 All ER 283, [1976] 1 WLR 591, CA, where there was a contract for the sale of land with completion in phases; no term could be implied that the purchaser had power to select which part of the land was to be included in each phase. See also *Legh v Haverfield* (1800) 5 Ves 452, where an agreement was established but the evidence as to its terms was contradictory, and specific performance was refused; *Hodges v Horsfall* (1829) 1 Russ & M 116 (sale of land according to plan insufficiently identified); *Kemble v Kean* (1829) 6 Sim 333 (engagement as actor, but terms vague); *Reynolds v Waring* (1831) 1 You 346 (uncertain evidence of oral agreement); *Callaghan v Callaghan* (1841) 8 Cl & Fin 374, HL (inconsistent terms); *Webb v Direct London and Portsmouth Rly Co* (1852) 1 De GM & G 521; *Lord James Stuart v London and North Western Rly Co* (1852) 1 De GM & G 721 (revsg 15 Beav 513) (agreement for sale of land required for a railway); *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA (agreement to build railway to plans of specified surveyor); *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119 (agreement to provide accommodation for sale of chocolate); *Williamson v Wooton* (1855) 3 Drew 210 (reservation of mines); *Lancaster v De Trafford* (1862) 8 Jur NS 873 (description of land vague); *Pearce v Watts* (1875) LR 20 Eq 492 at 493 per Jessel MR (agreement for sale of land subject to reservation of land 'necessary for a railway' held too vague, but if the conveyance is executed the exception, being uncertain, is bad); *Smith v Wheatcroft* (1878) 9 ChD 223 (sale of land); *Oxford Corp v Crow* [1893] 3 Ch 535; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA; *Macphail v Torrance* (1909) 25 TLR 810 (agreement to make ample provision by will). In *Pilling v Armitage* (1805) 12 Ves 78, the plaintiff, having failed to prove the agreement which he had set up, was refused specific performance of a different agreement admitted by the defendant. Cf *Legal v Miller* (1750) 2 Ves Sen 299 (lease of house).

2 *Brown v Gould* [1972] Ch 53 at 61-62, [1971] 2 All ER 1505 at 1512.

3 *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, [1960] 3 All ER 503, HL.

4 *Brown v Gould* [1972] Ch 53 at 56-57, [1971] 2 All ER 1505 at 1507, citing and applying *Re Lloyd's Trust Instruments* (24 June 1970, unreported) per Megarry J. See also *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803.

5 *Great Northern Rly Co v Manchester, Sheffield and Lincolnshire Rly Co* (1851) 5 De G & Sm 138. Cf *Roberts v Smith* (1859) 4 H & N 315; *Baumann v James* (1868) 3 Ch App 508 (an agreement to do specified 'and other' works, where the other works were clearly of small amount); *G Scammell & Nephew Ltd v Ouston* [1941] AC 251, [1941] 1 All ER 14, HL; *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, [1960] 3 All ER 503, HL (condition in planning permission); *Greater London Council v Connolly* [1970] 2 QB 100, [1970] 1 All ER 870, CA (rent liable to be changed on notice); *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505.

6 *Jenkins v Green* (1858) 27 Beav 437 (agreement to lease land 'less 37 acres'; defect capable of cure by selection by lessor before execution). Cf *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA, and contrast *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 2 All ER 283, [1976] 1 WLR 591, CA.

7 Cf *Oxford v Provand* (1868) LR 2 PC 135; *Waring and Gillow Ltd v Thompson* (1912) 29 TLR 154, CA; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL.

8 Cf *Richardson v Smith* (1870) 5 Ch App 648.

9 Cf *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA.

10 *Powell v Lovegrove* (1856) 8 De GM & G 357; *Cooper v Hood* (1858) 26 Beav 293; *Parker v Taswell* (1858) 2 De G & J 559. Cf *Baumann v James* (1868) 3 Ch App 508.

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#### **849. Uncertainty as to subject matter.**

The incompleteness of the contract may be in regard to the identification of the subject matter, and may arise either where the subject matter was not finally determined at the date of the contract but was left to be ascertained thereafter, in which case the defect may be cured if the subject matter is ascertained by the proper party prior to the action being brought<sup>1</sup>; or where the subject matter, although determined at the date of the contract, was not described sufficiently for identification, in which case the defect may be cured if the identification of the subject matter can be completed by admissible extrinsic evidence<sup>2</sup>. In some cases<sup>3</sup> the court acts on the maxim *id certum est quod certum reddi potest* (a thing is certain which can be rendered certain). The description must be such as to enable the court to ascertain what the parties intended to be the subject of their contract, and if this cannot be done specific performance is refused<sup>4</sup>.

1 *Jenkins v Green* (1858) 27 Beav 437; *Rumble v Heygate* (1870) 18 WR 749, where a contract for the sale of so much land as was necessary for a churchyard was made definite by selection by the plaintiff. Cf *Haywood v Cope* (1858) 25 Beav 140.

2 Thus oral evidence was admitted to identify 'your wool' (*Macdonald v Longbottom* (1860) 1 E & E 977); 'the lease' (*Horsey v Graham* (1869) LR 5 CP 9); and 'this place' (*Waldron v Jacob* (1870) IR 5 Eq 131). See also *Shardlow v Cotterell* (1881) 20 ChD 90, CA; cf *Clinan v Cooke* (1802) 1 Sch & Lef 22 (reference to another document); *Ogilvie v Foljambe* (1817) 3 Mer 53; *Skinner v M'Douall* (1848) 2 De G & Sm 265; *McMurray v Spicer* (1868) LR 5 Eq 527; *Plant v Bourne* [1897] 2 Ch 281, CA; *North v Percival* [1898] 2 Ch 128; *Harewood v Retese* [1990] 1 WLR 333, PC. See further CONTRACT vol 9(1) (Reissue) PARAS 673, 707. As to the admissibility of extrinsic evidence generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq.

3 See *Owen v Thomas* (1834) 3 My & K 353 (ascertainment of property not described in the contract save by reference to the deeds being in the possession of a named person); *Monro v Taylor* (1848) 8 Hare 51 (specified area of land described as partly freehold and partly leasehold); *Wylson v Dunn* (1887) 34 ChD 569 (land agreed upon). Cf *Naylor v Goodall* (1877) 26 WR 162.

4 *Daniels v Davison* (1809) 16 Ves 249 at 256; *Stewart v Alliston* (1815) 1 Mer 26; *Kennedy v Lee* (1817) 3 Mer 441; *Price v Griffith* (1851) 1 De GM & G 80; *Inge v Birmingham, Wolverhampton and Stour Valley Rly Co* (1853) 3 De GM & G 658.

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### 850. Uncertainty as to parties.

The contract may be incomplete because the parties are not expressly named. This will be a bar to specific performance unless the description of, or reference to, them in the contract is such as to enable them to be identified<sup>1</sup>. The contract of an agent who is lawfully authorised to sign<sup>2</sup> is treated for this purpose as the contract of his principal, and even though the principal's name does not appear in the writing his identity may be proved by oral evidence<sup>3</sup>. Moreover an agent who contracts in his own name does not cease to be contractually bound because the other party knew when the contract was made that he was acting as an agent<sup>4</sup>. Where, however, the contract shows that the agent was not himself to be liable and the principal is not sufficiently described therein or in some other document previously existing and sufficiently connected with it, the principal cannot sue on the contract<sup>5</sup>.

A description of a party simply as executor, personal representative, mortgagee or trustee is sufficient since oral evidence enables it to be ascertained who fills the capacity described<sup>6</sup>; and similarly it is sufficient if the vendor is described as the owner or proprietor of the property<sup>7</sup>. It is not, however, enough to refer simply to the vendor since that leaves the identity purely to oral evidence if there is nothing in the contract to show who the vendor is<sup>8</sup>; but, even in such a case, the terms of the contract may contain a sufficient description, as where the party is described as vendor and the conditions of sale show that the vendor is the person who is in possession<sup>9</sup>.

1 Cf *Potter v Duffield* (1874) LR 18 Eq 4; *Re Holland, Gregg v Holland* [1902] 2 Ch 360, CA. See CONTRACT vol 9(1) (Reissue) PARA 672 et seq.

2 Written authority is not required: *Gavaghan v Edwards* [1961] 2 QB 220, [1961] 2 All ER 477, CA.

3 *Commins v Scott* (1875) LR 20 Eq 11; *Filby v Hounsell* [1896] 2 Ch 737; *Basma v Weekes* [1950] AC 441 at 454, [1950] 2 All ER 146 at 152, PC. A signature by the auctioneer 'on behalf of the vendor' is not sufficient: *Potter v Duffield* (1874) LR 18 Eq 4. See further AGENCY vol 1 (2008) PARA 125; CONTRACT vol 9(1) (Reissue) PARAS 667-672.

4 *Lovesy v Palmer* [1916] 2 Ch 233; *Basma v Weekes* [1950] AC 441 at 454, [1950] 2 All ER 146 at 152, PC; *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA.

5 *Lovesy v Palmer* [1916] 2 Ch 233. Nor, it is conceived, can the principal be sued on it: cf *Sebright v Hanbury* [1916] 2 Ch 245, where, in a vendor's action for specific performance, the plaintiff was not allowed to interrogate the defendant with a view to discovering whether he was acting as agent for an undisclosed principal.

6 *Hood v Lord Barrington* (1868) LR 6 Eq 218; *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Fay v Miller, Wilkins & Co* [1941] Ch 360, [1941] 2 All ER 18, CA. See also *Bourdillon v Collins* (1871) 19 WR 556; *Towle v Topham* (1877) 37 LT 308; *Catling v King* (1877) 5 ChD 660, CA; and cf *Lovesy v Palmer* [1916] 2 Ch 233. See Fry on Specific Performance (6th Edn) 162.

7 *Sale v Lambert* (1874) LR 18 Eq 1; *Beer v London and Paris Hotel Co* (1875) LR 20 Eq 412.

8 *Potter v Duffield* (1874) LR 18 Eq 4; *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Jarrett v Hunter* (1886) 34 ChD 182; *Coombs v Wilkes* [1891] 3 Ch 77; *Pattle v Anstruther* (1893) 41 WR 625, CA. See also *Thomas v Brown* (1876) 1 QBD 714.

9 *Commins v Scott* (1875) LR 20 Eq 11, applied in *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733, where it was clear from the surrounding circumstances that the vendor's name was

inaccurately stated. See also *Carr v Lynch* [1900] 1 Ch 613; and the cases cited in CONTRACT vol 9(1) (Reissue) PARAS 667-672.



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### **(iii) Uncertainty as to Price**

#### **851. Price a material term.**

The price is a material term in every contract of sale, and unless the price is ascertained by the contract, or machinery is provided for its ascertainment, the contract is incomplete and cannot be enforced<sup>1</sup>. Thus the price is neither ascertained nor ascertainable, and there is no contract capable of enforcement where the vendor agrees to sell to a purchaser for a sum less by so much than any other purchaser will give<sup>2</sup> or at a price to be agreed upon from time to time<sup>3</sup>, or agrees to instruct his agent to negotiate a fair and reasonable contract price<sup>4</sup>.

1 See *Re Kharaskhoma Exploring and Prospecting Syndicate* [1897] 2 Ch 451, CA; *Douglas v Baynes* [1908] AC 477, PC. See also *Langstaff v Nicholson* (1858) 25 Beav 160; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 56 et seq; SALE OF LAND.

2 *Bromley v Jefferies* (1700) 2 Vern 415.

3 See *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA, where the price was to be 'based upon agreed estimates of the net cost of works and general overheads with a margin for profit of 5%'.

4 *May and Butcher Ltd v R* (1929) (reported as a note to *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 17, HL), where the price to be paid, and the date of payment, were to be agreed from time to time, as the goods became available. Contrast, however, *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803, where the vendor gave the purchaser a right of pre-emption 'at a figure to be agreed upon', and it was held that the vendor was obliged to act fairly to fix the price.

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### **852. Contract not fixing price.**

While not fixing a price, the contract may provide for a fair price or define how the price is to be ascertained. Specific performance will be granted if the contract attempts to fix the price by reference to some 'reasonable' yardstick, for example to fix the rent having regard to the market value of the premises at a certain date<sup>1</sup>, or at a reasonable valuation<sup>2</sup>. Moreover, where there is a subsisting estate in land for a fixed number of years at a fixed rent and thereafter at a rent to be agreed, the court will imply a term to pay a fair market rent in order to give business efficacy to the agreement<sup>3</sup>.

At one time the court would not enforce a term of the contract that valuers were to be appointed by the parties in circumstances where one of the parties refused to appoint<sup>4</sup>. It is now ready to do so<sup>5</sup> unless the price is to be fixed by a named individual or one who is chosen for his special knowledge<sup>6</sup>. Valuers belong to a recognised profession whose members are skilled and experienced in making assessments.

1 *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505.

2 *Talbot v Talbot* [1968] Ch 1, [1967] 2 All ER 920, CA. See also *Gregory v Mighell* (1811) 18 Ves 328.

3 *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA, where the parties agreed that no account should be taken of the tenant's improvements and that the rent should not be less than a certain sum.

4 See eg *Milnes v Gery* (1807) 14 Ves 400.

5 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL: see PARA 833 ante. Cf *Taylor Barnard Ltd v Tozer* (1983) 269 Estates Gazette 225 (where the machinery for fixing the price could not fail because of the statutory provisions relating to arbitration. The claim for specific performance failed, however, because there was as yet no concluded contract. All the relevant steps had not yet been taken). In the past the court would not intervene if the valuer failed to act or to give a valid valuation (*Chichester v M'Intire* (1830) 4 Bli NS 78) unless there was improper interference by one of the contracting parties (*Smith v Peters* (1875) LR 20 Eq 511).

6 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 479, [1982] 3 All ER 1 at 6, HL, per Lord Diplock and at 483-484 and 10 per Lord Fraser of Tullybelton.

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### **853. Value subsidiary to principal purpose of contract.**

Where the thing to be valued is subsidiary to the main purpose of the contract, the court may treat the mode of valuation as non-essential, and the contract as one for sale at a fair price<sup>1</sup>, for example in the case of a provision for the valuation of furniture<sup>2</sup> or fixtures, or of plant and machinery<sup>3</sup>. Similarly, where partnership articles provide for a valuation when the partnership expires, the particular mode may be treated as non-essential, and the court may provide for the fixing of a reasonable value<sup>4</sup>. On other occasions the court has severed the term providing the machinery for valuation from the rest of the contract<sup>5</sup>.

1 *Gourlay v Duke of Somerset* (1815) 19 Ves 429. See also *Hall v Warren* (1804) 9 Ves 605, and cf *Sanderson v Cockermouth and Workington Rly Co* (1849) 11 Beav 497 (purchase of land subject to the making of roads etc for cattle).

2 *Richardson v Smith* (1870) 5 Ch App 648, where, on an agreement for the purchase of land and premises at a named sum, and furniture at a price to be mutually agreed, no valuers were appointed and specific performance was granted as to the land and premises.

3 *Jackson v Jackson* (1853) 1 Sm & G 184, where, on an agreement to buy land and premises for a named sum and plant and machinery at valuation, the valuation was not made and specific performance was granted; *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119.

4 *Dinham v Bradford* (1869) 5 Ch App 519; see PARTNERSHIP vol 79 (2008) PARA 208.

5 *Richardson v Smith* (1870) 5 Ch 648.

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#### **(iv) Omission of Material Terms**

##### **854. Effect of omission of material terms.**

The material terms<sup>1</sup> must include the names of the parties, the description of the property and the contract price. They must also include all the terms to which the parties have expressly agreed. If a term is omitted, the court will deny specific performance unless it can imply such a term from the construction of the contract<sup>2</sup> or the term is such as will be implied in law<sup>3</sup>. An implied reference may be as effective as an express one. A party may, perhaps, waive an omitted term which is for his exclusive benefit or may offer to perform an omitted term which operates to his detriment<sup>4</sup>.

1 For examples of material terms see PARA 855 post.

2 *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880 at 888, CA; *Ridgway v Wharton* (1857) 6 HL Cas 238 at 285; *Rummens v Robins* (1865) 3 De GJ & Sm 88; see *Blore v Sutton* (1817) 3 Mer 237; *Nesham v Selby* (1872) LR 13 Eq 191 (affd 7 Ch App 406); *Marshall v Berridge* (1881) 19 ChD 233, CA, overruling *Jaques v Millar* (1877) 6 ChD 153; *Edwards v Jones* (1921) 124 LT 740, CA (cases in which the date of commencement of a lease was omitted); *Stimson v Gray* [1929] 1 Ch 629, where the conveyance was to be in a model form prepared for use in relation to a certain part of the vendor's estate, and no such model form was in existence.

3 See eg *Hampshire v Wickens* (1878) 7 ChD 555 (lease with 'usual covenants'); *Lucas v Hall* [1899] WN 92 ('usual public house contract'). For terms which will be implied see PARA 856 post.

4 See PARA 856 post.

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### **855. Examples of material terms.**

On the ground of absence of material terms the court may refuse to enforce a contract when it provides for an increase of rent but does not state from what time it is to commence<sup>1</sup>; when the contract omits the term that the purchase price is to be payable by instalments<sup>2</sup>, or the date of vacant possession<sup>3</sup>, or a promise to transfer the deposits on advance bookings along with the property<sup>4</sup>; when the contract does not define the length of the term agreed to be granted<sup>5</sup>; when an agreement for a partnership is silent as to the capital<sup>6</sup>; or when it is uncertain in view of the terms of the transaction what expenses are to be borne by the vendor<sup>7</sup>. Where a material term of a contract is left to future agreement, the contract is unenforceable until that term has been agreed<sup>8</sup>; and, where a material term is left to the decision of a third person, specific performance of the contract is granted only when he makes that decision<sup>9</sup>.

1 *Lord Ormond v Anderson* (1813) 2 Ball & B 363; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 95.

2 *Tweddell v Henderson* [1975] 2 All ER 1096, [1975] 1 WLR 1496.

3 *Johnson v Humphrey* [1946] 1 All ER 460; *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689.

4 *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212.

5 *Clinan v Cooke* (1802) 1 Sch & Lef 22; *Gordon v Trevelyan* (1814) 1 Price 64; *Wheeler v D'Esterre* (1814) 2 Dow 359, HL; *Bayley v Fitzmaurice* (1857) 8 E & B 664, Ex Ch. See *Re Lander and Bagley's Contract* [1892] 3 Ch 41.

6 *Downs v Collins* (1848) 6 Hare 418. Cf *Caddick v Skidmore* (1857) 2 De G & J 52; *Isaacs v Evans* [1899] WN 261; and see PARTNERSHIP vol 79 (2008) PARA 41.

7 *Stratford v Bosworth* (1813) 2 Ves & B 341, where the vendor stipulated that he should have £100 per acre 'clear of all expenses' and the parties differed as to what the phrase meant.

8 *Hall v Conder* (1857) 2 CBNS 22; *May v Thomson* (1882) 20 ChD 705, CA; *Ozd v Coombes* (1884) 28 Sol Jo 378.

9 *Tillett v Charing Cross Bridge Co* (1859) 26 Beav 419; *Lord Darnley v London, Chatham and Dover Rly Co* (1865) 3 De GJ & Sm 24 (on appeal (1867) LR 2 HL 43).

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### **856. Terms implied or inferred by law.**

In the absence of express agreement the law in many cases makes good the defect by supplying terms by implication or inference. Thus a contract to sell a house is prima facie construed as a contract to sell the fee simple free from incumbrances<sup>1</sup>, while a similar contract may, by reason of its other terms, be construed as a contract to sell the vendor's interest<sup>2</sup>. In a contract for the sale of land, a condition is implied for a good title and for delivery up of the deeds or satisfactory proof of their contents and loss<sup>3</sup>. Such conditions may, however, be waived<sup>4</sup>, or may be rebutted by the express terms of the contract<sup>5</sup>, or by notice<sup>6</sup>.

1 *Hughes v Parker* (1841) 8 M & W 244; *Re Ossemsley Estates Ltd* [1937] 3 All ER 774 at 778, CA; *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110, [1957] 3 All ER 265, CA. A similar implication arises if the sale is of registered land: see *Re Brine and Davies' Contract* [1935] Ch 388; *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA. See SALE OF LAND vol 42 (Reissue) PARA 54. As to implying terms in a contract to grant a lease see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 81. See generally CONTRACT vol 9(1) (Reissue) PARA 778 et seq.

2 *Bower v Cooper* (1843) 2 Hare 408. Cf *Flight v Barton* (1832) 3 My & K 282 (contract to take underlease implied notice of term of lease).

3 *Re Halifax Commercial Banking Co and Wood* (1898) 79 LT 536, CA; *Halkett v Earl of Dudley* [1907] 1 Ch 590. See SALE OF LAND vol 42 (Reissue) PARAS 131, 137 et seq, 158. As to the covenants for title implied by statute on the actual disposition of a property see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and REAL PROPERTY; SALE OF LAND.

4 *Bennett v Fowler* (1840) 2 Beav 302; *Hawksley v Outram* [1892] 3 Ch 359, CA. See, however, *Lloyd v Nowell* [1895] 2 Ch 744, where waiver of express stipulation as to preparing a formal contract was ineffectual.

5 *Freme v Wright* (1819) 4 Madd 364.

6 If the term is implied and the defect of title is irremovable: see PARA 877 post; *Ogilvie v Foljambe* (1817) 3 Mer 53; *Cowley v Watts* (1853) 17 Jur 172; *Cato v Thompson* (1882) 9 QBD 616, CA; *Re Gloag and Miller's Contract* (1883) 23 ChD 320; *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 132, [1957] 3 All ER 265 at 277, CA. Notice does not affect express terms: *Barnett v Wheeler* (1841) 7 M & W 364; *Lett v Randall* (1883) 49 LT 71. See also *McGrory v Alderdale Estate Co* [1918] AC 503, HL, where it was held that there is no distinction between waiver of a defect in title after contract and before hearing and the purchaser's knowledge of the defect at the time of the contract, so far as it relates to negating the implication of law as to a vendor's obligation to make a good title.

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### **857. Inference assisted by partial performance of the contract.**

Where a contract is prima facie incomplete, the court may be more ready to infer a term so as to make the contract complete and enforceable if there has been partial performance<sup>1</sup> on the faith of the contract<sup>2</sup>; but where a contract is, on the face of it, complete, oral evidence is not, as a rule, admitted to prove the exclusion of some material term<sup>3</sup>.

1 As to the effect of partial performance on uncertainty see PARA 846 ante. In relation to contracts for the sale of land the doctrine of part performance has been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2(8); and PARA 858 note 2 post.

2 *Browne v Warner* (1807) 14 Ves 156; *Re King's Leasehold Estates, ex p East of London Rly Co* (1873) LR 16 Eq 521; *Kusel v Watson* (1879) 11 ChD 129, CA; *Zimble v Abrahams* [1903] 1 KB 577, CA. See also *Stimson v Gray* [1929] 1 Ch 629, where possession taken by the purchaser was ineffectual to cure a defect due to the absence of a material term, the court being unable to determine all the material terms of the alleged contract, either by interpretation of the language or by holding that the missing details were such as the law would supply. Cf para 846 ante.

3 *Croome v Lediard* (1834) 2 My & K 251; *Thorpe v Hosford* (1872) 20 WR 922. As to oral additions or variations to a written contract see *Sullivan v Jacob* (1828) 1 Mol 472 (surrender and renewal of lease); *Clay v Rufford* (1849) 8 Hare 281 (partnership); *Martin v Pycroft* (1852) 2 De GM & G 785; *Vouillon v States* (1856) 2 Jur NS 845; *North v Loomes* [1919] 1 Ch 378. See generally CONTRACT vol 9(1) (Reissue) PARA 667 et seq.

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## **(4) NON-COMPLIANCE WITH STATUTORY REQUIREMENTS**

### **858. The statutory requirements.**

A contract for the sale or other disposition of an interest in land<sup>1</sup> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each<sup>2</sup>. The terms may be incorporated in a document either by being set out in it or by reference to some other document<sup>3</sup>. The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them, but not necessarily the same one, must be signed by or on behalf of each party to the contract<sup>4</sup>. A purported contract which does not comply with the statutory requirements is a nullity<sup>5</sup>.

Under the previous statutory provision<sup>6</sup>, which did not include the phrase 'all the terms', the courts were in some circumstances prepared to enforce a contract even though the relevant document did not contain all the terms of the agreement. A plaintiff might succeed if he could show that the omitted term was wholly for his benefit and that he was willing to waive it, though he might only be able to do this where the omitted term was not 'really an essential part of the bargain'<sup>7</sup>, or 'of no great importance'<sup>8</sup>. Similarly, if the omitted term was for the benefit of the defendant and the plaintiff was prepared to carry it out, the court might be willing to decree specific performance<sup>9</sup>. It remains to be seen whether the express reference to 'all the terms' in the current statutory provision<sup>10</sup> will inhibit the courts from taking this approach<sup>11</sup>.

1 'Interest in land' means any estate, interest or charge in or over land or in or over the proceeds of sale of land: Law of Property (Miscellaneous Provisions) Act 1989 s 2(6). The grant of an option to purchase land is within s 2, but a notice by the purchaser exercising the option is not (*Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600); nor is a lock out agreement (*Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA). Contracts to grant a short lease, contracts made in the course of a public auction and contracts regulated under the Financial Services Act 1986 do not come within the Law of Property (Miscellaneous Provisions) Act 1989 s 2: see s 2(5); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 79.

2 Ibid s 2(1). An exchange of contracts satisfying s 2 cannot be achieved by way of offer and acceptance in correspondence; there must be one document recording the agreement of both parties, or an exchange of contracts in the sense of the formal delivery by each party to the other of documents intended to take effect as formal documents and incorporating all the terms of an agreement already arrived at with the mutual intention that the parties are to be bound once contracts are exchanged: see *Commission for the New Towns v Cooper (GB) Ltd* [1995] 2 All ER 929, [1995] 2 WLR 677, CA (not following *Hooper v Sherman* (30 November 1994, unreported), CA (94/1428), where it was conceded that 'exchange of contracts' was not a term of art and the court held that an exchange of correspondence between solicitors could satisfy the statutory requirements). The Law of Property (Miscellaneous Provisions) Act 1989 s 2 supersedes the Law of Property Act 1925 s 40 (repealed) in relation to contracts made on or after 27 September 1989: see the Law of Property (Miscellaneous Provisions) Act 1989 ss 2(7), (8), 4, 5(3), (4), Sch 2. Under the Law of Property Act 1925 s 40 (repealed) no action could be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which the action was brought or some memorandum or note of it was in writing and signed by the party to be charged or some other person thereunto lawfully authorised by him; this provision continues to apply to contracts made before 27 September 1989. The doctrine of part performance was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 s 2(8), save in respect of contracts made before 27 September 1989, since under the new law failure to comply with the statutory requirements means that the purported contract is a nullity and part performance of a nullity cannot make it effective. As to the doctrine of part performance see SALE OF LAND.

3 Ibid s 2(2).



4 Ibid s 2(3). As to the meaning of 'signed' see *Firstpost Homes Ltd v Johnson* (1995) Times, 14 August, CA.

5 See *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. For the effect of a court order for rectification of one or more of the relevant documents see the Law of Property (Miscellaneous Provisions) Act 1989 s 2(4); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 80.

6 Ie the Law of Property Act 1925 s 40 (repealed). See also note 2 supra.

7 See *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689 per Evershed J. The omitted term related to vacant possession, but the plaintiff failed on the facts. See also *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148.

8 See *North v Loomes* [1919] 1 Ch 378 per Younger J.

9 *Martin v Pycroft* (1852) 2 De GM & G 785, 22 LJ Ch 94, CA; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583; but see *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689; *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212.

10 Ie the Law of Property (Miscellaneous Provisions) Act 1989 s 2: see the text and notes supra.

11 There is also a doubt whether, where a term expressly agreed between the parties is identical with a term which the law would imply in the absence of such agreement, it is necessary for it to be incorporated in the written document: see *Farrell v Green* (1974) 232 Estates Gazette 587.

## UPDATE

### 858 The statutory requirements

NOTE 1--Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) amended: SI 2001/3649, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (5) ILLEGALITY OF THE CONTRACT/859. Illegality as a bar to relief.

## **(5) ILLEGALITY OF THE CONTRACT**

### **859. Illegality as a bar to relief.**

The court does not interfere directly to enforce an illegal contract by specific performance<sup>1</sup>, any more than it assists indirectly to enforce it either by awarding damages or compensation, or ordering an account of profits among the parties interested<sup>2</sup>. For that reason the court will never compel a person to commit a breach of trust, particularly if the trustee would thereby be involved in an illegal act<sup>3</sup>.

The court may, however, grant specific performance of a contract which, although illegal when made, is subsequently validated by legislation<sup>4</sup>. Moreover, the court may be able to sever the illegal term from the legal term of the contract, which is otherwise specifically enforceable; so a person who has agreed to buy a rent-controlled tenancy may obtain specific performance of that agreement without paying the illegal premium which the vendor has demanded from him under the contract<sup>5</sup>.

1 See *Briggs v Parsloe* [1937] 3 All ER 831 at 838. As to the general nature and effect of illegality in contracts see CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

2 *Sykes v Beadon* (1879) 11 ChD 170 at 197 per Jessel MR.

3 *Briggs v Parsloe* [1937] 3 All ER 831 at 838.

4 *Rose Hall Ltd v Reeves* [1975] AC 411, [1975] 2 WLR 890, PC.

5 *Ailion v Spiekermann* [1976] Ch 158, [1976] 1 All ER 497, where the purchaser was an unwilling victim; had he not been, the court might have declined to order specific performance. Cf, however, *Gray v Southouse* [1949] 2 All ER 1019; *Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777; *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642; and see PARA 819 ante.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (5) ILLEGALITY OF THE CONTRACT/860. Enforcement of collateral transactions.

### **860. Enforcement of collateral transactions.**

Certain collateral transactions may be enforced, even though they concern an original transaction tainted with illegality. For instance a beneficiary can enforce performance of a trust against the trustee, even though the transaction in respect of which the money or property was transferred to the trustee was unlawful and could not have been enforced by the beneficiary against the person who so transferred to the trustee<sup>1</sup>.

<sup>1</sup> *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL (and see *Tribe v Tribe* [1995] 4 All ER 236, CA); *Powell v Knowler* (1741) 2 Atk 224; *Thomson v Thomson* (1802) 7 Ves 470. Cf *Tenant v Elliott* (1797) 1 Bos & P 3; *Farmer v Russell* (1798) 1 Bos & P 296; *M'Callan v Mortimer* (1842) 9 M & W 636, Ex Ch.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (5) ILLEGALITY OF THE CONTRACT/861. Sufficiency of evidence.

### **861. Sufficiency of evidence.**

There are conflicting opinions on the question whether in refusing to grant relief the court must be satisfied of actual illegality<sup>1</sup>, or whether it is enough that there should be reasonable ground for contending that the transaction is unlawful<sup>2</sup>.

If, however, it is open to the defendant to carry out his contractual obligation either in a manner which does not involve a breach of law or in a manner which does involve a breach of law, the court may order specific performance<sup>3</sup>.

1 *Aubin v Holt* (1855) 2 K & J 66 at 70 per Wood V-C.

2 *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914 at 923 per Knight Bruce LJ. Cf *De Hoghton v Money* (1866) 2 Ch App 164 at 169 per Turner LJ; *Pottinger v George* (1967) 116 CLR 328 at 337 (Aust HC).

3 Cf *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683; *Shaw v Groom* [1970] 2 QB 504, [1970] 1 All ER 702, CA.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (5) ILLEGALITY OF THE CONTRACT/862. Transactions ultra vires.

## **862. Transactions ultra vires.**

The validity of an act done by a company cannot be called into question on the ground of lack of capacity by reason of anything in the company's memorandum<sup>1</sup>. In favour of a person dealing with<sup>2</sup> a company in good faith<sup>3</sup>, the power of the board of directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution<sup>4</sup>. A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so<sup>5</sup>.

In any other case it may still be a defence that the transaction sought to be enforced is ultra vires<sup>6</sup>.

1 Companies Act 1985 s 35(1) (s 35 substituted, and ss 35A, 35B added, by the Companies Act 1989 s 108(1)). It remains, however, the duty of the directors to observe any limitations on their powers flowing from the company's memorandum; and action by the directors which but for the Companies Act 1985 s 35(1) (as so substituted) would be beyond the company's capacity may only be ratified by the company by special resolution; and a resolution ratifying such action does not affect any liability incurred by the directors or any other person: s 35(3) (as so substituted). Relief from any such liability must be agreed to separately by special resolution: s 35(3) (as so substituted). As to charitable companies see s 35(4) (as so substituted; amended by the Charities Act 1993 s 98(1), Sch 6 para 20(1), (2)); and CHARITIES vol 8 (2010) PARA 236 et seq.

2 For this purpose, a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party: Companies Act 1985 s 35A(2)(a) (as added: see note 1 supra).

3 For this purpose, a person is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution, and a person is to be presumed to have acted in good faith unless the contrary is proved: *ibid* s 35A(2)(b), (c) (as added: see note 1 supra). References to limitations on the directors' powers under the company's constitution include limitations deriving (1) from a resolution of the company in general meeting or a meeting of any class of shareholders; or (2) from any agreement between the members of the company or of any class of shareholders: s 35A(3) (as so added).

4 *Ibid* s 35A(1) (as added: see note 1 supra). Section 35A(1) (as so added) does not affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers: s 35A(5) (as so added). As to charitable companies see s 35A(6) (as so added; amended by the Charities Act 1993 Sch 6 para 20(1), (2)); and CHARITIES vol 8 (2010) PARA 236 et seq.

5 Companies Act 1985 s 35B (as added: see note 1 supra). Sections 35-35B (as respectively substituted and added: see note 1 supra) apply to unregistered companies incorporated in or having a principal place of business in Great Britain by virtue of s 718(1), Sch 22 (amended by the Companies Act 1989 ss 108(3), 109(2)); and by virtue of the Companies (Unregistered Companies) Regulations 1985, SI 1985/680, reg 4, Schedule (amended by SI 1990/438; SI 1990/1394; and SI 1990/2571) (but note regs 5(e), 6(a), (c)). See further COMPANIES vol 14 (2009) PARA 263.

6 Cf *Nash v Halifax Building Society* [1979] Ch 584, [1979] 2 All ER 19 (building society transaction illegal).

## **UPDATE**

## **862 Transactions ultra vires**

NOTE 5--SI 1985/680 replaced: Unregistered Companies Regulations 2009, SI 2009/2436.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/863. Contract unfair or oppressive.

## **(6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT**

### **863. Contract unfair or oppressive.**

The court's discretion to grant specific performance is not exercised if the contract is not 'equal and fair'<sup>1</sup>. Even though no fraud, duress or undue influence such as to justify rescission is shown, the court may still not enforce the contract<sup>2</sup> if it would not be consistent with equity and good conscience to do so<sup>3</sup>.

1 *Lord Walpole v Lord Orford* (1797) 3 Ves 402 at 420. Cf *Buxton v Lister* (1746) 3 Atk 383 at 386; *Rees v Marquis of Bute* [1916] 2 Ch 64.

2 *Willan v Willan* (1810) 16 Ves 72 at 83. See also *Savage v Taylor* (1736) Cas temp Talb 234; *Twining v Morrice* (1788) 2 Bro CC 326; *Davis v Symonds* (1787) 1 Cox Eq Cas 402; *Redshaw v Bedford Level (Governor & Co)* (1759) 1 Eden 346; *Clark v Malpas* (1862) 31 Beav 80; *Conlon v Murray* [1958] NI 17; *Buckley v Irwin* [1960] NI 98; and SALE OF LAND vol 42 (Reissue) PARA 56. Oral evidence is admissible to show unfairness depending not on the terms of the contract but on extrinsic circumstances: see *Davis v Symonds* supra. As to rescission see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

3 *Mortlock v Buller* (1804) 10 Ves 292 at 305; *Blomley v Ryan* (1956) 99 CLR 362 at 401, 402 (Aust HC); *Pateman v Pay* (1974) 232 Estates Gazette 457 (sharp practice: vendor mistaken). But contrast *Harrop v Thompson* [1975] 2 All ER 94, [1975] 1 WLR 545, where the plaintiff was granted specific performance even though he and another had agreed that that other should stay away from an auction, and consequently he had acquired the defendant's property cheaply.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/864. Time at which unfairness must be determined.

#### **864. Time at which unfairness must be determined.**

As a general rule, the question of unfairness must be determined as at the date of the making of the contract<sup>1</sup>. For instance, a family arrangement or other compromise is fair if entered into by both parties who have equal knowledge and means of knowledge, and who contract in view of some future and uncertain event or the future ascertainment of facts past but unknown<sup>2</sup>. That the contingency turns out adversely to one party does not render the contract unfair<sup>3</sup>. Where, however, the actual facts are such as to render what is sold worthless, and are known to one party but not to the other, the contract will not be enforced, even if it expressly deals with an uncertainty<sup>4</sup>; and, if the contingency is outside the contemplation of the parties, and different in kind and degree from such uncertainty as the parties contemplated, the court may refuse specific performance even though the contract is not discharged at law<sup>5</sup>.

A contract may be fair when it is made but subsequently circumstances may change to such an extent that it is oppressive specifically to enforce it<sup>6</sup>. For example, there may be unfairness or impropriety in the valuation made by a third person where under the contract the price is to be fixed by such a valuation<sup>7</sup>, but such circumstances will be rare.

1 *Revell v Hussey* (1813) 2 Ball & B 280 at 288.

2 *Williams v Williams* (1867) 2 Ch App 294 at 304 per Turner LJ. See also *Frank v Frank* (1667) 1 Cas in Ch 84; *Stapilton v Stapilton* (1739) 1 Atk 2; *Pickering v Pickering* (1839) 2 Beav 31 at 56; *Heap v Tonge* (1851) 9 Hare 90; *Bucknell v Bucknell* (1858) 7 I Ch R 130; and SETTLEMENTS.

3 *Emery v Wase* (1803) 8 Ves 505 at 517-518; *Lawton v Campion* (1854) 18 Beav 87. See also *Parker v Palmer* (1662) 1 Cas in Ch 42; *Anon* (1717-38) before Jekyll MR, cited in 6 Ves at 24 (future allotment sold for £20; subsequently allotted and worth £200); *Re Lightoller, ex p Peake* (1816) 1 Madd 346 (partner agreeing to give to retiring partner large sum for business although it was known to be insolvent).

4 *Smith v Harrison* (1857) 3 Jur NS 287.

5 *Baxendale v Seale* (1855) 19 Beav 601; *Davis v Shepherd* (1866) 1 Ch App 410 (uncertain amount of coal demised, but actual extent far in excess of parties' estimate).

6 *Patel v Ali* [1984] Ch 283, [1984] 1 All ER 978, where it was said that to make an order would inflict on the defendant 'a hardship amounting to injustice'.

7 *Emery v Wase* (1803) 8 Ves 505. Cf *Chichester v M'Intire* (1830) 4 Bli NS 78; *Eads v Williams* (1854) 4 De GM & G 674; *Collier v Mason* (1858) 25 Beav 200; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/865. Suppression of fact.

**865. Suppression of fact.**

Specific performance may be denied because the plaintiff has suppressed some relevant facts, even though he is under no duty to disclose them and the suppression does not amount to an actionable fraudulent, negligent or innocent misrepresentation<sup>1</sup>. For example a lessee may obtain the renewal of a lease while suppressing the fact that the person on whose life the old lease depended is in extremis<sup>2</sup>.

1 *Beyfus v Lodge* [1925] Ch 350; *Citytowns Ltd v Bohemian Properties Ltd* [1986] 2 EGLR 258.

2 *Ellard v Lord Llandaff* (1810) 1 Ball & B 241; *Hesse v Briant* (1856) 6 De GM & G 623, where a solicitor acting for both parties failed to make full disclosure to both.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/866. Relationship of the parties.

### 866. Relationship of the parties.

There may be circumstances in the position or mental state of the party against whom specific performance is sought which render it inequitable that the court should force him to perform his contract. The burden of proof lies on the party against whom specific performance is sought to establish such circumstances<sup>1</sup>. He must show that he is the victim of equitable fraud on the part of the other party, 'fraud' in its equitable context meaning an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties<sup>2</sup>.

These circumstances include intoxication<sup>3</sup>, intimidating and pressurising conduct which need not amount to duress or undue influence<sup>4</sup>, mental weakness not amounting to incapacity to contract (such as senility)<sup>5</sup>, distress<sup>6</sup>, illiteracy, lack of education<sup>7</sup>, want of advice<sup>8</sup> or similar circumstances appearing inconsistent with intelligent consent<sup>9</sup>. The court will certainly not grant specific performance if the plaintiff knew of the defendant's incapacity<sup>10</sup>. However it need not be shown that the plaintiff was guilty of intentional unfairness<sup>11</sup>; it is enough that he has contributed, albeit unintentionally, to the defendant's state of mind<sup>12</sup>.

1 *Broughton v Snook* [1938] Ch 505 at 512-513, [1938] 1 All ER 411 at 418-419. Cf *Blomley v Ryan* (1956) 99 CLR 362 at 428-429 (Aust HC).

2 *Earl of Aylesford v Morris* (1873) 8 Ch App 484 at 490-491; *Hart v O' Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See EQUITY vol 16(2) (Reissue) PARA 429.

3 *Cooke v Clayworth* (1811) 18 Ves 12; -- v *Ogden* (1827) 5 LJOS 104; *Nagle v Baylor* (1842) 3 Dr & War 60; *Cox v Smith* (1868) 19 LT 517 (sale of land: mistake). Distinguish *Shaw v Thackray* (1853) 1 Sm & G 537, where the intoxicated party was not the real defendant. In *Lightfoot v Heron* (1839) 3 Y & C Ex 586 drinking had not affected the parties' intelligence, and the contract was enforced. As to the effect of intoxication on the validity of contracts see *Matthews v Baxter* (1873) LR 8 Exch 132; and CONTRACT vol 9(1) (Reissue) PARA 717. As to its effect on gifts see GIFTS vol 52 (2009) PARA 211. As to suspicious circumstances generally as constituting a ground for refusing specific performance see *Rochfort v Creswick* (1721) 1 Bro Parl Cas 171 (sale of land: part execution); *West v Habgood* (1837) 6 LJ Ch 369 (sale of land); *Valentine v Dickinson* (1861) 7 Jur NS 857 (sale of houses).

4 *Dewar v Elliott* (1824) 2 LJOS 178: see CONTRACT vol 9(1) (Reissue) PARA 709 et seq.

5 *Clarkson v Hanway* (1723) 2 P Wms 203; *Bridgeman v Green* (1757) Wilm 58 at 61; *Gartside v Isherwood* (1783) 1 Bro CC 558; *Broughton v Snook* as reported in [1938] 1 All ER 411; *Watkin v Watson-Smith* (1986) Times, 3 July. It must be pleaded and proved that the incapacity was known, or ought to have been known, to the other party: *Broughton v Snook* supra at 417. Even where a contract was entered into by a person of unsound mind, if his affliction was not apparent and his consequent incapacity was not known to the other contracting party the validity of the contract is judged by the same standards as a contract made by a person of sound mind: *Hart v O' Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See PARA 920 post; and EQUITY vol 16(2) (Reissue) PARAS 429, 432. See also CONTRACT vol 9(1) (Reissue) PARA 649; MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

6 *Johnson v Nott* (1684) 1 Vern 271; *Kemeys v Hansard* (1815) Coop G 125.

7 *Clark v Malpas* (1862) 4 De GF & J 401; *Johnson v Buttress* (1936) 56 CLR 113 (Aust HC).

8 *Stanley v Robinson* (1830) 1 Russ & M 527; *Helsham v Langley* (1841) 1 Y & C Ch Cas 175; *Vivers v Tuck* (1863) 1 Moo PCCNS 516 at 527. See however *Lightfoot v Heron* (1839) 3 Y & C Ex 586, and *Haberdashers' Co v Issac* (1857) 3 Jur NS 611 (affd 29 LTOS 350), cases which show that mere want of legal advice is not enough.

9 *Bell v Howard* (1742) 9 Mod Rep 302; *Martin v Mitchell* (1820) 2 Jac & W 413; *Stanley v Robinson* (1830) 1 Russ & M 527; *Blomley v Ryan* (1956) 99 CLR 362 at 405 (Aust HC). If, however, the court is satisfied that the contract is fair and properly concluded, it grants specific performance: *Brinkley v Hann* (1843) Drury temp Sug

175. As to transactions impeachable from the position of the parties see MISREPRESENTATION AND FRAUD. As to equitable relief in cases of fiduciary relationship see EQUITY vol 16(2) (Reissue) PARA 851 et seq.

10     *Baskcomb v Beckwith* (1869) LR 8 Eq 100; *Denny v Hancock* (1870) 6 Ch App 1.

11     *Twining v Morrice* (1788) 2 Bro CC 326, where a purchase was not enforced against the vendor by reason of the solicitor's inadvertent conduct which 'damped' the sale; *Mortlock v Buller* (1804) 10 Ves 292; *Baskcomb v Beckwith* (1869) LR 8 Eq 100; *Denny v Hancock* (1870) 6 Ch App 1.

12     *Cooke v Clayworth* (1811) 18 Ves 12 at 15-16.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/867. Unfairness to third persons.

### 867. Unfairness to third persons.

A species of unfairness which may stay the hand of the court is that the contract, if enforced, would be injurious to third persons<sup>1</sup>, including members of the public<sup>2</sup>, or would involve a breach of trust<sup>3</sup> or a breach of a prior contract with a third person<sup>4</sup>, or would compel the defendant to do an act which he is not lawfully competent to do<sup>5</sup>, or would involve a gross breach of duty as between principal and agent<sup>6</sup>.

1 *Thomas v Dering* (1837) 1 Keen 729 (tendency to injure remaindermen); *McKewan v Sanderson* (1875) LR 20 Eq 65 (undue advantage over other creditors); *De Cordova v De Cordova* (1879) 4 App Cas 692, PC. Cf the decisions as to hardship to third persons cited in PARA 872 post.

2 See PARA 905 post. Cf *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA (public interest in the protection of the environment), where an injunction was refused. Contrast *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, CA, where an injunction was granted; *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA, where specific performance of a licence to occupy a hall was granted to a controversial political group.

3 *Byrne v Acton* (1721) 1 Bro Parl Cas 186; *Mortlock v Buller* (1804) 10 Ves 292 (extreme disadvantageousness of contract); *Harnett v Yielding* (1805) 2 Sch & Lef 549 (act in excess of power); *Ord v Noel* (1820) 5 Madd 438; *Thompson v Blackstone* (1843) 6 Beav 470 (contract entitling the purchaser to retain out of the purchase money a debt due from the trustee in his personal capacity); *Bellringer v Blagrove* (1847) 1 De G & Sm 63 (covenant ultra vires). See also *Hill v Buckley* (1811) 17 Ves 394; *Magrane v Archbold* (1813) 1 Dow 107, HL; *Bridger v Rice* (1819) 1 Jac & W 74; *Neale v Mackenzie* (1837) 1 Keen 474; *Wood v Richardson* (1840) 4 Beav 174; *White v Cudden* (1842) 8 Cl & Fin 766, HL (revsg *Cudden v Cartwright* (1840) 4 Y & C Ex 25); *Goodwin v Fielding* (1853) 4 De GM & G 90 (unbusinesslike character of transaction); *Maw v Topham* (1854) 19 Beav 576; *Sneesby v Thorne* (1855) 1 Jur NS 536 (affd 7 De GM & G 399); *Rede v Oakes* (1864) 4 De GJ & Sm 505; *Trappes v Cobb* (1867) 16 WR 117; *Naylor v Goodall* (1877) 47 LJ Ch 53; *Dunn v Flood* (1855) 28 ChD 586, CA (affg (1883) 25 ChD 629); *Briggs v Parsloe* [1937] 3 All ER 831. Where an innocent breach of trust has been committed as the result of a contract, the court may nevertheless enforce the contract by making the other party carry out his part of the bargain: *Briggs v Parsloe* supra.

4 *Willmott v Barber* (1880) 15 ChD 96 (contract to assign a lease containing a covenant not to assign); *PSM International plc and McKechnie plc v Whitehouse and Willenhall Automation Ltd* [1992] IRLR 279, CA. Cf *Weatherall v Geering* (1806) 12 Ves 504 at 511; *Mulholland v Belfast Corpn* (1859) 9 I Ch R 204; *Manchester Ship Canal Co v Manchester Racecourse Co* [1900] 2 Ch 352 at 367 (affd [1901] 2 Ch 37 at 50, CA).

5 *Byrne v Acton* (1721) 1 Bro Parl Cas 186; *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 554; *Tolson v Sheard* (1877) 5 ChD 19, CA; *Oceanic Steam Navigation Co v Sutherland* (1880) 16 ChD 236, CA; *New Windsor Corpn v Stovell* (1884) 27 ChD 665; *Delves v Gray* [1902] 2 Ch 606. See also *Mansfield v Childerhouse* (1876) 4 ChD 82.

6 *Shrewsbury and Birmingham Rly Co v London and North Western Rly Co etc* (1853) 4 De GM & G 115; affd (1857) 6 HL Cas 113 (railway directors). Cf *Mortlock v Buller* (1804) 10 Ves 292 at 313. Injury to the public is not a sufficient ground for refusing specific performance: *Raphael v Thames Valley Rly Co* (1867) 2 Ch App 147, revsg (1866) LR 2 Eq 37.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/ (6) UNFAIRNESS OR OPPRESSIVENESS OF THE CONTRACT/868. Inadequacy of consideration.

### **868. Inadequacy of consideration.**

Despite some earlier decisions to the contrary<sup>1</sup>, mere inadequacy of consideration is not in itself a ground for resisting specific performance unless it is so gross as to amount to conclusive evidence of fraud<sup>2</sup>, or there are other circumstances which, combined with the inadequacy, will induce the court not to enforce the contract<sup>3</sup>. Whenever the question of inadequacy of consideration is raised it must generally be determined as at the date of the contract<sup>4</sup>. Subsequent events are only relevant if they are of such a nature as to make it oppressive to enforce the contract<sup>5</sup>.

Further, it is clear that the court is not debarred from considering the question of inadequacy simply because the consideration has been determined by a valuer to whom it has been referred by the parties<sup>6</sup>.

1 *Savile v Savile* (1721) 1 P Wms 745; *Vaughan v Thomas* (1783) 1 Bro CC 556; *Day v Newman* (1788) 2 Cox Eq Cas 77; *Tilly v Peers* (1791) cited in 10 Ves at 301. See also *Nott v Hill* (1682) 2 Cas in Ch 120.

2 *Griffith v Spratley* (1787) 1 Cox Eq Cas 383; *Collier v Brown* (1788) 1 Cox Eq Cas 428; *White v Damon* (1802) 7 Ves 30; *Coles v Trecothick* (1804) 9 Ves 234 at 246; *Underhill v Horwood* (1804) 10 Ves 209; *Burrowes v Lock* (1805) 10 Ves 470; *Lowther v Lord Lowther* (1806) 13 Ves 95 at 103; *Stilwell v Wilkins* (1821) Jac 280 at 282; *Bower v Cooper* (1843) 2 Hare 408 at 411; *Borell v Dann* (1843) 2 Hare 440; *Stephens v Hotham* (1855) 1 K & J 571; *Harrison v Guest* (1855) 6 De GM & G 424 (affd (1860) 8 HL Cas 481); *Haywood v Cope* (1858) 25 Beav 140; *Holmes v Howes* (1872) 20 WR 310. See also *Axelsen v O'Brien* (1949) 80 CLR 219 at 226 (Aust HC); *Blomley v Ryan* (1956) 99 CLR 362 at 405 (Aust HC). In *Abbott v Swooder* (1852) 4 De G & Sm 448, the excessive price to be paid by the purchaser (£5,000 for an estate worth £3,500) was held to be no defence to an action by the vendor. *Falcke v Gray* (1859) 4 Drew 651 is contrary to the course of authority. As to unconscionable bargains generally see EQUITY vol 16(2) (Reissue) PARA 416 et seq.

3 For instances see *Young v Clerk* (1720) Prec Ch 538 (ignorance); *Deane v Rastron* (1792) 1 Anst 64 (deliberate suppression of true value). Cf *Lewis v Lord Lechmere* (1722) 10 Mod Rep 503; *Callaghan v Callaghan* (1841) 8 Cl & Fin 374, HL, where the transaction was held to be in the nature of a gift, not a sale; *Cockell v Taylor* (1851) 15 Beav 103, where there was great undervalue coupled with illiteracy and humble circumstances. See also PARA 866 ante.

4 *Mortimer v Capper* (1782) 1 Bro CC 156.

5 See PARA 864 ante.

6 *Emery v Wase* (1803) 8 Ves 505; *Parken v Whitby* (1823) Turn & R 366.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/869. Hardship resulting from performance.

## **(7) HARDSHIP**

### **869. Hardship resulting from performance.**

Specific performance may not be ordered where performance would involve, even without any impropriety on the part of the plaintiff<sup>1</sup>, great hardship to the defendant<sup>2</sup>, so much so that it would be unreasonable and harsh to grant equitable relief<sup>3</sup>. Such hardship may be apparent on the face of the contract, or latent and the result of collateral matters, in which event the court is more likely to refuse performance<sup>4</sup>.

1 *Falcke v Gray* (1859) 4 Drew 651 at 660.

2 -- *v White* (circa 1709) 3 Swan 108n (wayleave); *Gould v Kemp* (1834) 2 My & K 304 at 308; *Re Highett and Bird's Contract* [1903] 1 Ch 287 at 293-294, CA.

3 *Wedgwood v Adams* (1843) 6 Beav 600 at 605; *Watson v Marston* (1853) 4 De GM & G 230; *Eastes v Russ* [1914] 1 Ch 468 at 480, CA. See *Patel v Ali* [1984] Ch 283, [1984] 1 All ER 978 (defendant contracted to sell her house; after date of contract she became disabled; specific performance of completion of contract refused).

4 See eg *Faine v Brown* (1750) cited in 2 Ves Sen 307, where the defendant would forfeit half the purchase price if the sale was specifically enforced.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/870. Time at which hardship must arise.

### **870. Time at which hardship must arise.**

As a general rule, hardship must exist at the time of the contract if it is to be a defence to a claim for specific performance. Thus the court may refuse to enforce an award on a submission to arbitration if the submission involves hardship<sup>1</sup>, but not on the ground of mere hardship and unreasonableness in the award itself<sup>2</sup>. Similarly a covenant to renew a sublease without fine may be enforced even though the terms of the renewal of the head lease are changed and made more onerous<sup>3</sup>. Exceptionally, hardship subsequently arising may be treated as a ground for refusing specific performance<sup>4</sup>. This is generally so if the change of conditions involving hardship to the defendant has resulted from the act of the plaintiff<sup>5</sup>, especially if the plaintiff's conduct operated as something in the nature of a trap<sup>6</sup>.

1 *Nickels v Hancock* (1855) 7 De GM & G 300. See generally ARBITRATION vol 2 (2008) PARA 1201 et seq.

2 *Wood v Griffith* (1818) 1 Swan 43; *Weekes v Gallard* (1869) 18 WR 331.

3 *Evans v Walshe* (1805) 2 Sch & Lef 519; *Revell v Hussey* (1813) 2 Ball & B 280; *Lawder v Blachford* (1815) Beat 522.

4 *City of London v Nash* (1747) 3 Atk 512, where a covenant to rebuild houses in good condition and repair was not enforced; *Costigan v Hastler* (1804) 2 Sch & Lef 159, where a mortgagor's contract to grant a lease was not enforced because the mortgagee refused consent; *Webb v Direct London and Portsmouth Rly Co* (1852) 1 De GM & G 521. Cf *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA. See *Patel v Ali* [1984] Ch 283, [1984] 1 All ER 978 (defendant contracted to sell her house; after date of contract she became disabled; specific performance of completion of contract refused).

5 *Duke of Bedford v Trustees of British Museum* (1822) 2 My & K 552, where an alteration in the character of the neighbourhood due to the plaintiff's acts was the ground for not enforcing restrictive covenants. See, however, EQUITY vol 16(2) (Reissue) PARA 630 et seq (discharge or modification of restrictive covenants). See also *Davis v Hone* (1805) 2 Sch & Lef 341; *Shrewsbury and Birmingham Rly Co v Stour Valley Rly Co* (1852) 2 De GM & G 866 at 882; *Sayers v Collyer* (1884) 28 ChD 103, CA; *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224.

6 *Dowson v Solomon* (1859) 1 Drew & Sm 1.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/871. Hardship flowing from defendant's conduct.

### **871. Hardship flowing from defendant's conduct.**

Hardship which flows from the conduct of the defendant<sup>1</sup>, or hardship which results to the defendant simply because the purpose he had in view when he made the contract has now failed<sup>2</sup>, or because his speculation has proved unfortunate to him<sup>3</sup>, cannot be set up by way of defence. Where the defendant is a company it is not relevant that performance may involve hardship to individual members as distinguished from the company<sup>4</sup>.

1 *Storer v Great Western Rly Co* (1842) 2 Y & C Ch Cas 48 at 52; *Hawkes v Eastern Counties Rly Co* (1852) 1 De GM & G 737 (affd (1855) 5 HL Cas 331).

2 *Adams v Weare* (1784) 1 Bro CC 567; *Emery v Wase* (1803) 8 Ves 505 at 517-518; *Webb v Direct London and Portsmouth Rly Co* (1851) 9 Hare 129 at 140 per Turner V-C; *Lord James Stuart v London and North Western Rly Co* (1852) 15 Beav 513 at 523 per Romilly MR; *Morley v Clavering* (1860) 29 Beav 84.

3 *Haywood v Cope* (1858) 25 Beav 140; *Mountford v Scott* [1975] Ch 258 at 264, [1975] 1 All ER 198 at 200-201, CA.

4 *Edwards v Grand Junction Rly Co* (1836) 1 My & Cr 650; *Hawkes v Eastern Counties Rly Co* (1852) 1 De GM & G 737 (affd sub nom *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/872. Hardship to third persons.

### **872. Hardship to third persons.**

In certain circumstances a court may refuse to grant specific performance on the ground that it would cause hardship to a third person, for example, if it would compel the third person to join in a sale when he had no wish to do so<sup>1</sup> or would lead to the eviction of the defendant's children from the family home<sup>2</sup>.

1 *Thomas v Dering* (1837) 1 Keen 729 at 747-748; *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528, where a husband who owned the home jointly with his wife contracted to sell without his wife's authority. Cf *Cedar Holdings Ltd v Green* [1981] Ch 129 at 147, [1979] 3 All ER 117, CA. This decision was overruled in *Williams and Glyn's Bank Ltd v Boland*, *Williams and Glyn's Bank Ltd v Brown* [1981] AC 487, [1980] 2 All ER 408, HL, but for different reasons, namely that it was unreal to describe a spouse's interest in a matrimonial home simply as an interest in the proceeds of sale.

2 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897. See *Patel v Ali* [1984] Ch 283, [1984] 1 All ER 978 (specific performance of completion of sale of house would make it difficult for disabled defendant to care for her children). See also *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA (husband, now bankrupt, was co-owner of house with his wife and purported to charge the whole legal and beneficial interest; order for partial performance of husband's contract to create an equitable charge refused because an order, if made, would expose the wife to proceedings under the Law of Property Act 1925 s 30 (as amended) likely to result in an order for the sale of the matrimonial home she occupied). See PARAS 951-952 post.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/873. Relief granted on terms to prevent hardship.

**873. Relief granted on terms to prevent hardship.**

A plaintiff is sometimes granted specific performance only on certain terms imposed to avoid hardship which would otherwise result to the defendant. Thus a vendor liable to covenants in respect of the land can compel the purchaser to elect either to rescind the contract or to execute an indemnity against such covenants as a term of specific performance<sup>1</sup>. Moreover, in certain circumstances the purchaser may be granted specific performance with compensation if the vendor is not able to convey what he has contracted to sell<sup>2</sup>.

1 *Moxhay v Inderwick* (1847) 1 De G & Sm 708; *Lukey v Higgs* (1855) 1 Jur NS 200; *Re Poole and Clarke's Contract* [1904] 2 Ch 173, CA; *Reckitt v Cody* [1920] 2 Ch 452. Cf *Hutchinson v Payne* [1975] VR 175 (Vict).

2 As to specific performance with compensation see PARA 948 et seq post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(7) HARDSHIP/874. Circumstances in which no relief is granted.

#### **874. Circumstances in which no relief is granted.**

The following are examples of circumstances in which the court is unwilling, on the ground of hardship, to enforce contracts:

- 7 (1) where there is no right of way to the land sold<sup>1</sup>;
- 8 (2) where, without the knowledge of either vendor or purchaser, the property is being used by the tenant as a disorderly house<sup>2</sup>;
- 9 (3) where the vendors have personally agreed to discharge the estate from incumbrances, and some of the vendors are trustees<sup>3</sup>;
- 10 (4) where trustees have sold in circumstances which would constitute a breach of trust<sup>4</sup>;
- 11 (5) where a mortgagee who has foreclosed and intended to sell as absolute owner has by inadvertence purported to sell as a mortgagee with a power of sale<sup>5</sup>; and
- 12 (6) where the defendant, if required to perform, would be left with a remedy against an insolvent person<sup>6</sup> or would have to bear the risk of a criminal prosecution<sup>7</sup> or would be involved in costly and hazardous litigation which might lead to his eviction and the splitting up of his family<sup>8</sup>.

The fact that performance would expose the defendant to forfeiture constitutes such hardship as induces the court to refuse performance, at least if forfeiture would clearly result<sup>9</sup>. A mere possibility is not enough<sup>10</sup>, and forfeiture not resulting directly from performance of the contract, but proximately caused by other acts of the defendant, constitutes no defence<sup>11</sup>.

1 *Denne v Light* (1857) 8 De GM & G 774. See *Tomlinson v Manchester and Birmingham Rly Co* (1840) 2 Ry & Can Cas 104; and SALE OF LAND vol 42 (Reissue) PARA 57 NOTE 1.

2 *Hope v Walter* [1900] 1 Ch 257, CA (revsg [1899] 1 Ch 879), where a counterclaim for rescission and return of deposit failed in both courts.

3 *Wedgwood v Adams* (1843) 6 Beav 600.

4 *Mortlock v Buller* (1804) 10 Ves 292; *White v Cuddon* (1842) 8 Cl & Fin 766, HL: see TRUSTS vol 48 (2007 Reissue) PARA 1096.

5 *Watson v Marston* (1853) 4 De GM & G 230. Such a sale would open the foreclosure: see MORTGAGE vol 32 (2005 Reissue) PARA 815. For other cases of hardship see *Dean and Chapter of Ely v Stewart* (1740) 2 Atk 44 (covenant to leave buildings in repair); *Hamilton v Grant* (1815) 3 Dow 33, HL; *Kimberley v Jennings* (1836) 6 Sim 340; *Talbot v Ford* (1842) 13 Sim 173; *Shrewsbury and Birmingham Rly Co v London and North Western Rly Co etc* (1853) 4 De GM & G 115 (affd (1857) 6 HL Cas 113), where the parties were companies.

6 *Neale v Mackenzie* (1837) 1 Keen 474.

7 *Pottinger v George* (1967) 116 CLR 328 at 337 (Aust HC).

8 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897.

9 *Faine v Brown* (1750) cited in 2 Ves Sen 307, where a sale would have involved forfeiture of half the purchase money to the vendor's brother; *Peacock v Person* (1848) 11 Beav 355, where a covenant to make a road was not enforced on the ground of risk of forfeiting the land, but compensation was given; *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA, where rescission was granted on the ground that breaches

of covenant were defects in the vendor's title. Cf *Warmington v Miller* [1973] QB 877, [1973] 2 All ER 372, CA, following *Willmott v Barber* (1880) 15 ChD 96, where (in each case) a contract was made in breach of a covenant in a lease not to assign.

10     *Rankin v Lay* (1860) 2 De GF & J 65.

11     *Helling v Lumley* (1858) 3 De G & J 493.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(8) MISREPRESENTATION, FRAUD AND MISTAKE/875. Misrepresentation.

## **(8) MISREPRESENTATION, FRAUD AND MISTAKE**

### **875. Misrepresentation.**

In actions for specific performance the general rule is that any misrepresentation<sup>1</sup>, whether fraudulent, negligent or innocent, may be a bar to the enforcement of the contract by the party responsible for the misrepresentation which induced it<sup>2</sup>. Whether a misrepresentation is a bar to specific performance depends on a number of factors. If a defendant has a right to rescind the contract, it is clear that he will not be compelled specifically to perform it<sup>3</sup>; but specific performance may be denied even though rescission has never been, or is no longer, possible<sup>4</sup>. A misrepresentation of a less serious nature than that required to rescind a contract may be sufficient to resist specific performance<sup>5</sup>. For example, a person may innocently misrepresent his opinion or may make a representation as to future events, the state of the law or the state of his title. Specific performance may also be denied because rescission is no longer possible; the representee may have been guilty of laches and have thereby lost his right to rescind; and in such instances it may be harsh or oppressive to compel the representee to perform the contract<sup>6</sup>. So the nature of the misrepresentation may not enable the representee to rescind the contract but its existence will be sufficient defence to an action for specific performance<sup>7</sup>. Oral evidence is admissible to prove such misrepresentation<sup>8</sup>.

Even when the plaintiff's misrepresentation relates to part only of the contract, performance of the entire contract is not enforced, even with compensation, against the defendant's will<sup>9</sup>. That the person making the misrepresentation believed it to be true is not material in an action of this nature, since it would be inequitable to allow a party to enforce performance of a contract obtained by a representation for which he is responsible and which is found to be incorrect<sup>10</sup>; nor is it material for this purpose whether the representation was made by the party or his agent, or whether, if made by the agent, it was within the agent's actual authority, since it would be inequitable for the party to take advantage of his agent's misstatement<sup>11</sup>.

<sup>1</sup> As to misrepresentation and fraud generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 785-768, 814 et seq.

<sup>2</sup> *Brereton v Cowper* (1724) 1 Bro Parl Cas 211 (value of land); *Wall v Stubbs* (1815) 1 Madd 80; *Evans v Edmonds* (1853) 13 CB 777; *Lachlan v Reynolds* (1853) Kay 52, where property was described as in the occupation of a tenant who was, in fact, the tenant of an adverse claimant; *Higgins v Samels* (1862) 2 John & H 460 at 466; *Peek v Gurney* (1873) LR 6 HL 377. See *Phillips v Duke of Bucks* (1683) 1 Vern 227 (surprise and circumvention); *Webb v Kirby* (1856) 7 De GM & G 376; *Hannah v Hodgson* (1861) 30 Beav 19 (imperfect deed); *Turquand v Rhodes* (1868) 37 LJ Ch 830 (misdescription); *Roots v Snelling* (1883) 48 LT 216 (material misrepresentation as to price).

<sup>3</sup> See eg *Cadman v Horner* (1810) 18 Ves 10; *Caballero v Henty* (1874) 9 Ch App 447; *Redgrave v Hurd* (1881) 20 ChD 1, CA; *Jacobs v Revell* [1900] 2 Ch 858. See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 785 note 4.

<sup>4</sup> *Lamare v Dixon* (1873) LR 6 HL 414 at 428; *Re Banister, Broad v Munton* (1879) 12 ChD 131 at 142, CA.

<sup>5</sup> *Re Terry and White's Contract* (1886) 32 ChD 14 at 29, CA.

<sup>6</sup> *Hope v Walter* [1900] 1 Ch 257, CA, where a vendor innocently misrepresented that the property was an investment and the tenant used it as a brothel.

7 Cf *Beaumont v Dukes* (1822) Jac 422, where a vendor represented that he would improve access; *Myers v Watson* (1851) 1 Sim NS 523 at 529, where a vendor represented that a church would be built; *Re Banister, Broad v Munton* (1879) 12 ChD 131, CA, where there was a misleading condition of sale. See also *Holliday v Lockwood* [1917] 2 Ch 47, where a representation induced the plaintiff to buy only one of two adjoining lots and specific performance of the sale of both was denied; *Peacock v Penson* (1848) 11 Beav 355 (departure from plan exhibited).

8 *Flood v Finlay* (1811) 2 Ball & B 9 at 15; *Winch v Winchester* (1812) 1 Ves & B 375 (land short in quantity).

9 *Viscount Clermont v Tasburgh* (1819) 1 Jac & W 112 at 119. Cf *Rawlins v Wickham* (1858) 3 De G & J 304, but see *Charlesworth v Jennings* (1864) 11 LT 439 (partnership).

10 *Redgrave v Hurd* (1881) 20 ChD 1, CA.

11 *Re Hull and London Life Assurance Co and Hull and London Fire Insurance Co, Gibson's Case, Kemp's Case, Hudson's Case* (1858) 2 De G & J 275; *Re Royal British Bank, Nicol's Case* (1859) 3 De G & J 387; *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259, Ex Ch; *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64. See also *Winch v Winchester* (1812) 1 Ves & B 375; *Mullens v Miller* (1882) 22 ChD 194 (false representation by agent); Fry on Specific Performance (6th Edn) 313; and, generally, AGENCY vol 1 (2008) PARA 135 et seq. A fortiori if the agent is acting within the scope of his authority: cf *Gosling v Anderson* (1972) Times, 8 February, CA, where damages were ordered for misrepresentations made by the vendor's estate agent.

## UPDATE

### 875 Misrepresentation

NOTE 4--A defendant who has lost the right to rescission may rely on the plaintiff's misrepresentations in resisting an application for specific performance, unless he has lost the right to rescission through affirmation, since in those circumstances there would be an unconscionable inconsistency between the defendant's defence to the action and his conduct in allowing the contract to continue: *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(8) MISREPRESENTATION, FRAUD AND MISTAKE/876. Mistake.

### 876. Mistake.

A contract which is void or voidable on the ground of mistake will not be specifically enforced<sup>1</sup>. Such would be the case if the contract had been entered into under a mistake shared by both parties. The general principle is that the defendant cannot successfully defeat an action for specific performance by the simple statement that he has made a mistake<sup>2</sup>. Specific performance may, however, be denied if the plaintiff has contributed, albeit innocently, to the defendant's mistake<sup>3</sup>; or has taken advantage of his mistake, for example if he accepts an offer knowing that it was made in a different sense from that intended<sup>4</sup>; or if the contract is ambiguous, for example as to the description of the property<sup>5</sup>. Exceptionally, specific performance is also refused if the defendant proves that he understood the agreement to be something different from the plaintiff's understanding of it and that he would suffer hardship if the contract were specifically enforced<sup>6</sup>. Where mistake is a defence, equity may grant specific performance on terms<sup>7</sup>.

Mistake may bring into effect the court's equitable jurisdiction to rectify a written contract where the parties, having mutually agreed on the terms, have by mistake failed to express these terms with accuracy in the written contract<sup>8</sup>. Where the court has ordered rectification of a contract on this ground, it can in the same action order specific performance of the contract as rectified even if the contract is one to which the statutory requirements as to writing<sup>9</sup> apply<sup>10</sup>.

1 *Denny v Hancock* (1870) 6 Ch App 1; *Bligh v Martin* [1968] 1 All ER 1157 at 1162, [1968] 1 WLR 804 at 814.

2 *Tamplin v James* (1880) 15 ChD 215, CA.

3 *Baskcomb v Beckwith* (1869) LR 8 Eq 100; *Caballero v Henty* (1874) 9 Ch App 447 at 450; *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436; *Cross v Cross* (1983) 4 FLR 235.

4 *Malins v Freeman* (1837) 2 Keen 25 at 34; *Webster v Cecil* (1861) 30 Beav 62.

5 *Malins v Freeman* (1837) 2 Keen 25; *Manser v Black* (1848) 6 Hare 443; *Tamplin v James* (1880) 15 ChD 215, CA; *Van Praagh v Everidge* [1903] 1 Ch 434, CA.

6 *Wycombe Rly Co v Donnington Hospital* (1866) 1 Ch App 268, where the defendant was a charitable corporation; *Tamplin v James* (1880) 15 ChD 215, CA; *Burrow v Scammell* (1881) 19 ChD 175 at 182. But contrast *Riverplate Properties Ltd v Paul* [1975] Ch 133 at 145, [1974] 2 All ER 656 at 665, CA, per curiam.

7 *Baskcomb v Beckwith* (1869) LR 8 Eq 100, where terms were imposed on the vendor.

8 As to rectification see MISTAKE vol 32 (2005 Reissue) PARA 55 et seq; and as to rescission on the ground of mistake see MISTAKE vol 32 (2005 Reissue) PARA 43.

9 As to these requirements see PARA 858 ante.

10 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC. These cases were decided on the Statute of Frauds (1677) (repealed) but it is thought that the same principle would apply to cases under the Law of Property (Miscellaneous Provisions) Act 1989. See further s 2(4); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 80. The previous law must not, however, be permitted to 'clutter the new Act with ancient baggage': see *Firstpost Homes Ltd v Johnson* (1995) Times, 14 August, CA (a decision on the meaning of 'signed' in the Law of Property (Miscellaneous Provisions) Act 1989 s 2(3)).



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(9) DEFECTS IN SUBJECT MATTER OF CONTRACT/877. Defect apart from fraud.

## **(9) DEFECTS IN SUBJECT MATTER OF CONTRACT**

### **877. Defect apart from fraud.**

Apart from any question of fraud<sup>1</sup> or misrepresentation<sup>2</sup>, the existence of a defect in the subject matter of the contract is in certain instances a ground for refusing specific performance<sup>3</sup>.

Most of the cases concern contracts for the sale of land. The vendor is under a duty to prove his title and to convey what he has contracted to convey<sup>4</sup>. Consequently if there is any substantial variation<sup>5</sup> between the property offered and the property contracted to be sold, the purchaser can resist specific performance even though the variation is beneficial to him<sup>6</sup>. Whether the difference is substantial is a question of fact. If the purchaser has knowledge of an irremovable defect of title at the date of the contract, it cannot be implied that the vendor promised to convey an unincumbered freehold interest<sup>7</sup>; if the defect is removable<sup>8</sup>, then, subject to any agreement to the contrary, the purchaser may assume that the vendor will remove it<sup>9</sup>. If the purchaser did not know of the defect and is to resist specific performance he must show that the defect is substantial and latent, in the sense that a purchaser could not have discovered its existence by exercising reasonable care<sup>10</sup> in his inspection of the title or the property. The latent defect may be that the property is subject to unusual or onerous covenants<sup>11</sup> or may relate to the physical nature of the property<sup>12</sup>.

The question has frequently arisen as to the effect of an exclusion clause, such as 'no error, misstatement or omission in the particulars shall annul a sale'. Despite such a clause, specific performance will be denied if the vendor failed to make disclosure of a substantial defect of the existence of which he was aware (he cannot compel a purchaser to assume what he knows to be untrue<sup>13</sup>), or if he innocently misrepresents the state of the title when the true facts are within his knowledge<sup>14</sup>. Again it has long been established that if the defect is substantial not only will specific performance be denied but the purchaser will be entitled to rescind the contract<sup>15</sup>. If the defect is trivial or insubstantial, a vendor may be denied specific performance simply because the purchaser's claim for compensation is excluded, or limited by, the contract<sup>16</sup>. Moreover, any clause which attempts to exclude or limit the liability of the representor is valid only if the representor can satisfy the court that it is fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made<sup>17</sup>.

1 As to the effect of fraud see PARA 875 ante.

2 As to misrepresentation as a ground for refusing relief see PARA 875 ante.

3 *Whitmel v Farrel* (1749) 1 Ves Sen 256 (marriage settlement); *Bentley v Craven* (1853) 17 Beav 204. Cf *Crosse v Lawrence* (1852) 9 Hare 462; *Crosse v Keene* (1852) 9 Hare 469; *Sun Building Society v Western Suburban and Harrow Road Building Society* [1921] 2 Ch 438, CA.

4 *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415; *Pinekerry Ltd v Needs (Kenneth) (Contractors) Ltd* (1992) 64 P & CR 245, CA.

5 As to what is a substantial variation see inter alia *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA; *Jacobs v Revell* [1900] 2 Ch 858; *Shepherd v Croft* [1911] 1 Ch 521; *Holliday v Lockwood* [1917] 2 Ch 47; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19; *Citytowns Ltd v Bohemian Properties Ltd* [1986] 2 EGLR 258.



6 *Ayles v Cox* (1852) 16 Beav 23.

7 *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 132, [1957] 3 All ER 265 at 277, CA. It is otherwise if the contract contains an express term that good title should be conveyed: see *Cato v Thompson* (1882) 9 QBD 616, CA.

8 Cf *Burnell v Brown* (1820) 1 Jac & W 168; *Castle v Wilkinson* (1870) 5 Ch App 534.

9 *English v Murray* (1883) 49 LT 35; *Lett v Randall* (1883) 49 LT 71; *Re Gloag and Miller's Contract* (1883) 23 ChD 320.

10 See *Denny v Hancock* (1870) 6 Ch App 1 at 12 per James LJ. Cf *Yandle & Sons v Sutton* [1922] 2 Ch 199; *Simpson v Gilley* (1922) 92 LJ Ch 194.

11 An example is the sale of leaseholds where the vendor is silent as to unusual and onerous covenants (*Hampshire v Wickens* (1878) 7 ChD 555; *Re Lander and Bagley's Contract* [1892] 3 Ch 41; *Molyneux v Hawtrey* [1903] 2 KB 487, CA), unless the purchaser ought himself to have ascertained their existence (*Reeve v Berridge* (1888) 20 QBD 523, CA; *Re White and Smith's Contract* [1896] 1 Ch 637), since it is the vendor's duty in a case relating to real property to disclose any material defect not ascertainable in the ordinary course by the purchaser (*Carlsh v Salt* [1906] 1 Ch 335; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; see SALE OF LAND vol 42 (Reissue) PARA 41 et seq). See also *Stevens v Adamson* (1818) 2 Stark 422 (fact of notice of re-entry not disclosed to purchaser of leaseholds); *Ballard v Way* (1836) 1 M & W 520; *Darlington v Hamilton* (1854) Kay 550 ('leaseholds' held by underlease, the head lease comprising other property); *Turner v Turner* [1881] WN 70; *Heywood v Mallalieu* (1883) 25 ChD 357 (claim to an easement stated by the vendor to be negligible); *Re Lloyds Bank Ltd and Lillington's Contract* [1912] 1 Ch 601; *Allen v Smith* [1924] 2 Ch 308 (long leaseholds; lease stated to be in 'ordinary' form, but containing onerous and unusual covenant); *Beyfus v Lodge* [1925] Ch 350 (leaseholds; non-disclosure of landlord's notice to repair); *Flexman v Corbett* [1930] 1 Ch 672 (leaseholds; onerous and unusual covenant and proviso for re-entry).

12 *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505, where a farm described as lying within a ring fence was seen by the purchaser and specific performance was denied.

13 *Heywood v Mallalieu* (1883) 25 ChD 357; *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261 (affd (1886) 16 QBD 778, CA); *Beyfus v Lodge* [1925] Ch 350. But if the purchaser takes the risk that title may be bad, specific performance will be decreed unless it is manifest that the title is plainly indefensible: see *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA.

14 *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495. See also *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128; *Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202, CA.

15 *Flight v Booth* (1834) 1 Bing NC 370; *King Bros (Finance) Ltd v North Western British Road Services Ltd* [1986] 2 EGLR 253.

16 *Watson v Burton* [1956] 3 All ER 929 at 934, [1957] 1 WLR 19 at 25. For that reason a prudent vendor may waive the benefit of the clause and agree to pay compensation: see *Shepherd v Croft* [1911] 1 Ch 521 at 529-530. It is a distinct question whether an appropriately drafted exclusion clause can prevent a purchaser recovering damages at law. In *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261 the purchaser was allowed to rescind and recover the deposit: see the Law of Property Act 1925 s 49(2); and PARA 947 post. However, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL, the House of Lords held that an appropriately drafted clause could, as a matter of construction, exclude or limit the liability of a contracting party. It is unlikely that such a clause could protect a vendor who knew of the defect of title. But the position is uncertain if the seller innocently misrepresents the title or (an even more difficult case) if he is ignorant of the defect. Cf *Ward v Hobbs* (1878) 4 App Cas 13, HL (sale of pigs with all faults). If such a clause attempts to exclude or limit the liability of a representor, it may be held to be unreasonable: see the Misrepresentation Act 1967 s 3 (substituted by the Unfair Contract Terms Act 1977 s 8(1)).

17 See the Misrepresentation Act 1967 s 3 (as substituted: see note 16 supra); and CONTRACT vol 9(1) (Reissue) PARA 799.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(9) DEFECTS IN SUBJECT MATTER OF CONTRACT/878. Proof of title on a sale of land.

### **878. Proof of title on a sale of land.**

A particular instance in which nonperformance of a condition by the plaintiff is a bar to his action is where he is a vendor of land suing for specific performance of the contract, but is unable to prove a good title<sup>1</sup>. Although the rule<sup>2</sup>, established in the early part of the eighteenth century<sup>3</sup>, that specific performance will be refused if the court, although not actually pronouncing a title to be bad, considers it too doubtful to be forced on a purchaser<sup>4</sup> is still in force<sup>5</sup>, the defence that a title is too doubtful to be forced on a purchaser has in modern times found little favour with the court, and the general rule now is that it is the court's duty, unless there are exceptional circumstances<sup>6</sup>, to decide the rights between vendor and purchaser and to ascertain and determine as best it may what the law is<sup>7</sup>. The mere possibility that a claimant to an incumbrance, not bound by a decision of the court in proceedings to which he was not a party, may involve the purchaser in future litigation should not deter the court from finding the title good. This is so whether the doubt as to the title is one of law or of fact. It is difficult to define with precision what degree of doubt as to title will lead the court to refuse specific performance<sup>8</sup>. The general principle appears to be this: if the facts and circumstances of the case are so compelling that the court concludes beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of the incumbrance<sup>9</sup>, the court should declare in favour of a good title shown<sup>10</sup>. The case law suggests the following specific rules:

- 13 (1) the existence of a decision of a court of co-ordinate jurisdiction, which the court thinks wrong, leads the court to refuse performance both where such decision is adverse to the title and where it is in favour of it<sup>11</sup>; where the decision is that of an inferior court which a higher court thinks wrong, the higher court does not treat the title as doubtful if the decision of the inferior court was adverse to the title<sup>12</sup>, although, on the other hand, the title is treated as doubtful if the decision was in its favour<sup>13</sup>;
- 14 (2) where the title depends on the particular words of an inartistic and ambiguous document, the court treats the title as doubtful<sup>14</sup>, but not if the difficulty can be solved by the application of general rules of construction<sup>15</sup>, or if it depends on the general law of the land<sup>16</sup>;
- 15 (3) where the proof of the title depends on doubtful facts as to which no clear presumption in favour of the title can be drawn<sup>17</sup>, or as to which the presumption, although not necessarily conclusive, is adverse<sup>18</sup>, the title is treated as doubtful; but it is not so treated where there is a presumption in favour of the facts supporting the title<sup>19</sup>, or where the objection amounts simply to a suspicion of bad faith, so that the presumption in favour of good faith may be invoked<sup>20</sup>;
- 16 (4) where there is substantial doubt whether all the relevant evidence is before the court, specific performance will be refused<sup>21</sup>; and
- 17 (5) if the defect does not detract from the purchaser's enjoyment of the property, the court may order specific performance with compensation<sup>22</sup>.

1 As to title generally see SALE OF LAND vol 42 (Reissue) PARA 137 et seq. As to the practice on reference of title see PARA 934 et seq post. As to the covenants for title implied by statute on the actual disposition of a property see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and REAL PROPERTY; SALE OF LAND.

2 For a statement of the general principle see *Parker v Tootal* (1865) 11 HL Cas 143 at 158 per Lord Westbury LC; *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43 at 46, CA. See also *Marlow v Smith* (1723) 2 P

Wms 198; *Shapland v Smith* (1780) 1 Bro CC 75; *Cooper v Denne* (1792) 1 Ves 565; *Sheffield v Lord Mulgrave* (1795) 2 Ves 526; *Roake v Kidd* (1800) 5 Ves 647; *Vancouver v Bliss* (1805) 11 Ves 458 at 465; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559 at 568; *Willcox v Bellaers* (1825) Turn & R 491; *Smith v Colbourne* [1914] 2 Ch 533 at 541, 544, CA; *Johnson v Clarke* [1928] Ch 847. The practical justification of the rule is that the court's decision in an action of specific performance would not bind third persons not present before the court: see *Glass v Richardson* (1852) 9 Hare 698 at 701 per Turner V-C (on appeal 2 De GM & G 658); *Osborne v Rowlett* (1880) 13 ChD 774 at 781 per Jessel MR. Cf *Re Reilly and Brady's Contract* [1910] 1 IR 258.

3 The original practice of the Court of Chancery was to decide for or against the title, and to grant or refuse specific performance accordingly: see Fry on Specific Performance (6th Edn) 410 et seq.

4 See *Marlow v Smith* (1723) 2 P Wms 198; *Sloper v Fish* (1813) 2 Ves & B 145 at 149.

5 *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43, CA. The rule was recognised by the House of Lords in *Parker v Tootal* (1865) 11 HL Cas 143.

6 These exist where there is a real difficulty in construing a document, for example where extrinsic evidence has to be obtained to resolve a latent ambiguity of description in the document, and the point of construction can be determined conclusively by a very easy procedure such as an originating summons between the proper parties: see *Wilson v Thomas* [1958] 1 All ER 871, [1958] 1 WLR 422, where vendors, beneficiaries under an ambiguous will, were not entitled to have the title cleared at the purchaser's expense (following *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43, CA). The reported cases do not indicate what other circumstances will be considered as exceptional.

7 *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL. See also *Alexander v Mills* (1870) 6 Ch App 124; *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43, CA; *Smith v Colbourne* [1914] 2 Ch 533, CA; *Johnson v Clarke* [1928] Ch 847, where the vendor was given no costs.

8 *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL, is now the leading case. The earlier authorities include *Sheffield v Lord Mulgrave* (1795) 2 Ves 526; *Rose v Calland* (1800) 5 Ves 186; *Lord Braybroke v Inskip* (1803) 8 Ves 417 at 428; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559; *Price v Strange* (1820) 6 Madd 159; *Pyrke v Waddingham* (1852) 10 Hare 1 at 8; *Rogers v Waterhouse* (1858) 4 Drew 329; *Collier v McBean* (1865) 1 Ch App 81; *Hamilton v Buckmaster* (1866) LR 3 Eq 323; *Williams v Scott* [1900] AC 499, PC. See also *Wrigley v Sykes* (1856) 21 Beav 337; *Bull v Hutchens* (1863) 32 Beav 615; *Austin v Tawney* (1867) 2 Ch App 143; *Beioley v Carter* (1869) 4 Ch App 230; *Mullings v Trinder* (1870) LR 10 Eq 449; *Alexander v Mills* (1870) 6 Ch App 124; *Highgate Archway Co v Jeakes* (1871) LR 12 Eq 9; *Radford v Willis* (1871) 7 Ch App 7; *Bell v Holtby* (1873) LR 15 Eq 178; *Wise v Piper* (1880) 13 ChD 848; *Palmer v Locke* (1881) 18 ChD 381, CA.

The doubt which influences the court may be one of general law (*Sloper v Fish* (1813) 2 Ves & B 145; *Blosse v Lord Clanmorris* (1821) 3 Bli 62, HL; *Re Thackwray and Young's Contract* (1888) 40 ChD 34), or of the construction of the particular documents (*Earl of Lincoln v Arcedeckne* (1844) 1 Coll 98; *Bristow v Wood* (1844) 1 Coll 480), or of facts on the title or extrinsic to it (*Pyrke v Waddingham* supra), and the facts may be doubtful either as not being satisfactorily established (*Smith v Death* (1820) 5 Madd 371), or as being negative and not admitting of satisfactory proof (*Lowes v Lush* (1808) 14 Ves 547).

9 *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 725, HL.

10 In *MEPC Ltd v Christian-Edwards* [1981] AC 205 at 220, [1979] 3 All ER 752 at 757-758, HL, Lord Russell suggested that, where the doubt is one of fact, the old test as to whether it would be the duty of a judge to direct a jury to find in favour of the fact may be too stringent. For the earlier authorities see *Price v Strange* (1820) 6 Madd 159; *Sharp v Adcock* (1828) 4 Russ 374; *Cattell v Corral* (1840) 4 Y & C Ex 228 at 237; *Heseltine v Simmons* (1858) 6 WR 268; *Potter v Perry* (1859) 7 WR 182; *Pegler v White* (1864) 33 Beav 403; *Burnell v Firth* (1867) 15 WR 546. Cf *Re New Land Development Association and Gray* [1892] 2 Ch 138, CA; *Re Calcott and Elvin's Contract* [1898] 2 Ch 460, CA; *Williams v Scott* [1900] AC 499, PC. As further illustrations see *Re Maskell and Goldfinch's Contract* [1895] 2 Ch 525; *Re Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540; *Re Marshall and Salt's Contract* [1900] 2 Ch 202; *Re Douglas and Powell's Contract* [1902] 2 Ch 296; *Re Verrell's Contract* [1903] 1 Ch 65. Where the probability of litigation was not great, specific performance was denied: see *Lyddall v Weston* (1739) 2 Atk 19 (mathematical certainty impossible); *Seaman v Vawdrey* (1810) 16 Ves 390 at 393; *Martin v Cotter* (1846) 3 Jo & Lat 496; *Spencer v Topham* (1856) 22 Beav 573; *Falkner v Equitable Reversionary Society* (1858) 4 Drew 352; *Noyes v Paterson* [1894] 3 Ch 267; *Hepworth v Pickles* [1900] 1 Ch 108; *Re Summerson, Downie v Summerson* [1900] 1 Ch 112n. In *George v Thomas* (1904) 90 LT 505 the action was adjourned to give a third person, who was a claimant, an opportunity of establishing his claim.

11 *Mullings v Trinder* (1870) LR 10 Eq 449.

12 *Sheppard v Doolan* (1842) 3 Dr & War 1 at 8; *Beioley v Carter* (1869) 4 Ch App 230.

13 *Mullings v Trinder* (1870) LR 10 Eq 449.

14 *Alexander v Mills* (1870) 6 Ch App 124 at 132 per James LJ.

15 *Radford v Willis* (1871) 7 Ch App 7.

16 *Alexander v Mills* (1870) 6 Ch App 124; *Forster v Abraham* (1874) LR 17 Eq 351; *Osborne to Rowlett* (1880) 13 ChD 774; *Mogridge v Clapp* [1892] 3 Ch 382, CA; *Re Thompson and M'Williams' Contract* [1896] 1 IR 356; *Re Carter and Kenderdine's Contract* [1897] 1 Ch 776, CA (overruling *Re Briggs and Spicer* [1891] 2 Ch 127). Cf *Re Handman and Wilcox's Contract* [1902] 1 Ch 599 at 609, CA; *Johnson v Clarke* [1928] Ch 847.

17 See *Lowes v Lush* (1808) 14 Ves 547 (no creditor able to take advantage of act of bankruptcy); *Eyton v Dicken* (1817) 4 Price 303 (presumption from mere fact of possession); *Freer v Hesse* (1853) 4 De GM & G 495 (absence of notice of incumbrance); *Re Handman and Wilcox's Contract* [1902] 1 Ch 599, CA (absence of notice); *Re Douglas and Powell's Contract* [1902] 2 Ch 296 (complicated and ambiguous facts).

18 *Warde v Dixon* (1858) 28 LJ Ch 315.

19 *Barnwell v Harris* (1809) 1 Taunt 430; *Emery v Grocock* (1821) 6 Madd 54; *Prosser v Watts* (1821) 6 Madd 59; *Causton v Macklew* (1828) 2 Sim 242; *Magennis v Fallon* (1829) 2 Mol 561.

20 *M'Queen v Farquhar* (1805) 11 Ves 467; *Cattell v Corral* (1840) 4 Y & C Ex 228 (criticising dicta in *Hartley v Smith* (1819) Buck 368); *Green v Pulsford* (1839) 2 Beav 70; *Grove v Bastard* (1848) 2 Ph 619 (subsequent proceedings (1851) 1 De GM & G 69); *Re Huish's Charity* (1870) LR 10 Eq 5; *Alexander v Mills* (1870) 6 Ch App 124. When title depended on a will, the absence of the heir and the fact that the will had been proved against him were not in themselves enough to prevent performance: see *Colton v Wilson* (1733) 3 P Wms 190; *Morrison v Arnold* (1817) 19 Ves 670; *Weddall v Nixon* (1853) 17 Beav 160.

21 *Mullings v Trinder* (1870) LR 10 Eq 449 at 455; *Wilson v Thomas* [1958] 1 All ER 871 at 877-878, [1958] 1 WLR 422 at 430-431. Cf *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA (a 'plain case' under RSC Ord 86).

22 As to specific performance with compensation see PARA 948 et seq post.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(10) NON-PERFORMANCE OF CONDITIONS ON PLAINTIFF'S PART/(i) In general/879. Failure to be ready and willing to perform the contract.

## **(10) NON-PERFORMANCE OF CONDITIONS ON PLAINTIFF'S PART**

### **(i) In general**

#### **879. Failure to be ready and willing to perform the contract.**

A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract<sup>1</sup>. A contractual term purporting to oust this principle cannot fetter the court's discretion to grant or refuse specific performance after taking account of the plaintiff's conduct<sup>2</sup>. Subject to certain exceptions<sup>3</sup>, any failure on his part or breach of his own obligation bars his claim to specific performance<sup>4</sup>. Subject to any provision in the contract<sup>5</sup>, a vendor has until the time fixed for completion to perform the conditions<sup>6</sup>.

1 Cf *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL; *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA; *Australian Hardwoods Pty Ltd v Railways Comr* [1961] 1 All ER 737, [1961] 1 WLR 425, PC; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 All ER 376, [1984] 1 WLR 776, CA; affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL. See also *Stratford v Earl of Aldborough* (1786) 1 Ridg Parl Rep 287; *Acraman v Price*, *Davies v Price* (1870) 18 WR 540. Cf *Sun Building Society v Western Suburban and Harrow Road Building Society* [1921] 2 Ch 438, CA, where a vendor unable to transfer the full benefit of the subject matters covered by the contract was held not to be 'ready and willing', and accordingly was refused specific performance. Repudiation by the defendant does not excuse the plaintiff from showing performance or readiness to perform on his part: *Ellis v Rogers* (1884) 29 ChD 661 (left open on appeal at 671, CA) (building lease); *Morrow v Carty* [1957] NI 174; and see PARA 923 post.

2 *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442.

3 See PARA 883 post.

4 *Strong v Stringer* (1889) 61 LT 470; *Hooper v Bromet* (1904) 90 LT 234, CA; *Australian Hardwoods Pty Ltd v Railways Comr* [1961] 1 All ER 737, [1961] 1 WLR 425, PC; *Doyle v East* [1972] 2 All ER 1013, [1972] 1 WLR 1080, where a builder failed to build a house in substantial accordance with the agreement. See also *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368. There is an apparent exception where the separate parts of an agreement are severable and in truth amount to separate contracts; in such instances, failure by the plaintiff to fulfil conditions as to one part does not bar his claim for performance of a separate part in respect of which he has fulfilled his obligations: see *Wilkinson v Clements* (1872) 8 Ch App 96 (building agreement). However, as a rule, a contract must be specifically performed as a whole, or the court will entirely refuse to enforce it: see *Wood v Rowe* (1820) 2 Bli 595, HL (agreement to settle litigation); *Ford v Stuart* (1852) 15 Beav 493 (mortgage and settlement).

5 As to the construction and effect of a clause giving a written notice to complete see *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, [1974] 1 WLR 68, CA; *Cole v Rose* [1978] 3 All ER 1121; *Singh (Sudagar) v Nazeer* [1979] Ch 474, [1978] 3 All ER 817.

6 *Smith v Butler* [1900] 1 QB 694, CA; *Re Sandwell Park Colliery Co, Field v The Co* [1929] 1 Ch 277 (sale subject to court's consent in a debenture holder's action).

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## (ii) Conditions Precedent

### 880. Relief granted only if conditions precedent are performed.

The plaintiff must show performance or fulfilment of conditions precedent<sup>1</sup>, whether to be performed by him or not, since until such performance or fulfilment the contract has not become absolute and the plaintiff is not entitled to enforce it<sup>2</sup>. The following are illustrations: a condition to the taking of the lease of a public house that the lessor should use his best endeavours to obtain a licence and that a licence should be obtained<sup>3</sup>; and a condition, in the case of a covenant to renew a lease, that repairing covenants should have been performed<sup>4</sup>. A requirement in a contract for the sale of land that a deposit should be paid does not, however, constitute a condition precedent; it is in general to be taken as a fundamental term of the contract<sup>5</sup>. To be within the rule a condition need not be express, but may be implied from the terms of the contract; thus, where a contract is to grant a lease to a nominee to be named by the plaintiff, his naming a nominee is a condition precedent<sup>6</sup>. A condition remains capable of fulfilment, in a case between vendor and purchaser, at any time until the time fixed for completion of the contract<sup>7</sup>; but the defendant's repudiation of the contract discharges the plaintiff from the performance of any condition precedent<sup>8</sup>.

1 As to conditions precedent generally see CONTRACT vol 9(1) (Reissue) PARA 962 et seq. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 95, 136, 140, 142.

2 *Scott v Liverpool Corp'n* (1858) 1 Giff 216 (affd 3 De G & J 334); *Abbot v Blair* (1860) 8 WR 672; *Douglas v Sidmouth Rly and Harbour Co* (1866) 14 WR 361; *Little v Courage Ltd* (1994) Times, 19 January. Cf *Regent's Canal Co v Ware* (1857) 23 Beav 575 at 586; *Doyle v East* [1972] 2 All ER 1013, [1972] 1 WLR 1080.

3 *Modlen v Snowball* (1861) 29 Beav 641; affd 4 De GF & J 143. A different principle applies in the case of an existing licence where the contract contains no express condition: *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch 705. Cf *Re Ward and Jordan's Contract* [1902] 1 IR 73. As to a landlord's licence to assign see *Bickel v Courtenay Investments (Nominees) Ltd* [1984] 1 All ER 657, [1984] 1 WLR 795; *29 Equities Ltd v Bank Leumi (UK) Ltd* [1987] 1 All ER 108, [1986] 1 WLR 1490, CA.

4 *Bastin v Bidwell* (1881) 18 ChD 238; *Greville v Parker* [1910] AC 335, PC. In *Starkey v Barton* [1909] 1 Ch 284, no default was committed.

5 *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422.

6 *Williams v Brisco* (1882) 22 ChD 441, CA. Contracts relating to the purchase of land and payment of compensation by railway companies have been treated as conditional on the construction of the line: see *Webb v Direct London and Portsmouth Rly Co* (1852) 1 De GM & G 521; *Lord James Stuart v London and North Western Rly Co* (1852) 1 De GM & G 721; *Gage v Newmarket Rly Co* (1852) 18 QB 457; *Scottish North Eastern Rly Co v Stewart* (1859) 3 Macq 382, HL. Cf *Edinburgh, Perth and Dundee Rly Co v Philip* (1857) 2 Macq 514, HL. The doubts expressed in *Hawkes v Eastern Counties Rly Co* (1852) 1 De GM & G 737 (affd sub nom *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331) seem to refer to jurisdiction rather than to construction.

7 *Smith v Butler* [1900] 1 QB 694, CA; *Re Sandwell Park Colliery Co* [1929] 1 Ch 277; *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, [1959] 3 All ER 910, PC.

8 *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169, where it was held that an innocent party had no obligation to show that he was able and willing to complete.

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**881. Waiver by the defendant.**

Non-performance of a condition precedent does not constitute a defence to an action if performance has been waived by the person entitled to require it<sup>1</sup>, provided the condition is solely for his benefit<sup>2</sup> and has been waived intentionally and with full knowledge<sup>3</sup>.

1 *Beatson v Nicholson* (1842) 6 Jur 620.

2 *Hawksley v Outram* [1892] 3 Ch 359, CA; *North v Loomes* [1919] 1 Ch 378 at 385-386; *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689; *Shelley v United Artists Corp Ltd* (1990) 60 P & CR 241, CA. Cf *Lloyd v Nowell* [1895] 2 Ch 744, where the condition was held to be not solely for the plaintiff's benefit; *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148; *Ganton House Investments Ltd v Corbin* [1988] 2 EGLR 69; *Graham v Pitkin* [1992] 2 All ER 235, [1991] 1 WLR 403, PC. See also *Balbosa v Ayoub Ali* [1990] 1 WLR 914, PC.

3 *Earl of Darnley v London, Chatham and Dover Rly Co* (1867) LR 2 HL 43.

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**882. Title depending on adverse possession.**

In some cases the court has compelled a purchaser to take a title depending on adverse possession<sup>1</sup>, but he has not been compelled to take a leap in the dark<sup>2</sup>. In those cases, objections apparent on the face of the title as shown were covered by the possession<sup>3</sup>.

1 See *Scott v Nixon* (1843) 3 Dr & War 388.

2 *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 402; affd [1906] 1 Ch 386, CA. See SALE OF LAND vol 42 (Reissue) PARA 143.

3 *Games v Bonnor* (1884) 54 LJ Ch 517, CA; *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1, CA. See further LIMITATION PERIODS vol 68 (2008) PARA 1097.



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### 883. Supervening circumstances.

Performance of a condition may have become impossible by reason of events subsequent to the contract<sup>1</sup>. If a contract is discharged at law by reason of supervening circumstances<sup>2</sup>, there can be no question of specific performance. Conversely, the contract may be such that the subsequent events do not affect its validity or the right to specific performance. For example a contract for the sale of a house is not affected where, before completion, the house is burnt down<sup>3</sup>. A similar principle applies to the purchase of an annuity where the purchaser dies before any payment of the annuity is made<sup>4</sup>, or of shares in a company which is wound up after the date of the contract but before completion<sup>5</sup>. Where the impossibility, although of a nature to affect the right to performance, relates to subsidiary, non-essential matters (such as where there is a deficiency in the acreage to be sold) or merely to literal fulfilment, the court seeks to grant performance with compensation<sup>6</sup>. Similarly, if after substantial performance by a plaintiff of his obligation it has, without any default on his part, become impossible for him to make complete performance and the status quo ante cannot be restored, the court may enforce performance by the other party<sup>7</sup>. The appointment of a receiver does not of itself afford a vendor company a defence to a claim by the purchaser for specific performance of the contract<sup>8</sup>.

1 From such cases must be distinguished those in which no contract has ever come into existence by reason of mistake, the parties having contracted with reference to a state of things which at the date of the contract did not exist, so that the contract is thereby void: see MISTAKE vol 32 (2005 Reissue) PARA 10 et seq. Cf the similar rule at common law where specific goods are sold which at the date of the contract and unknown to the parties do not exist: see the Sale of Goods Act 1979 s 6; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 54. However, the parties may have expressly contracted so as to exclude any such question: *Hanks v Palling* (1856) 6 E & B 659.

2 An example is a frustrating event: see CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

3 *Harford v Purrier* (1816) 1 Madd 532 at 539, where it was held that a good title must eventually be made out. Distinguish *Counter v Macpherson* (1845) 5 Moo PCC 83, where the contract was conditional on the completion of a warehouse, and a fire occurred before that was done. As to the general principle see also *Paine v Meller* (1801) 6 Ves 349; *Revell v Hussey* (1813) 2 Ball & B 280 at 287. As to the position as between vendor and purchaser in the case of loss by fire of property subject to a contract still in the making see INSURANCE vol 25 (2003 Reissue) PARAS 608, 625. An agreement for a lease may, however, be frustrated, as may a licence to use or occupy land: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 601.

4 *Mortimer v Capper* (1782) 1 Bro CC 156; *Jackson v Lever* (1792) 3 Bro CC 605, where the vendor died before payment. *Pope v Roots* (1774) 1 Bro Parl Cas 370, HL, seems to have been decided on the ground of hardship.

5 *Paine v Hutchinson* (1866) LR 3 Eq 257 (affd (1868) 3 Ch App 388); *Evans v Wood* (1867) LR 5 Eq 9; *Coles v Bristowe* (1868) LR 6 Eq 149 (revsd on a different ground 4 Ch App 3). The court will take all steps in its power to procure the registration of the shares and to indemnify the transferor against calls. As further illustrations of the same principle see *Carter v Carter* (1733) Cas temp Talb 271; *Akhurst v Jackson* (1818) 1 Swan 85; and cf *Coles v Trecothick* (1804) 9 Ves 234 at 246.

6 *Norris v Jackson* (1862) 3 Giff 396. As to specific performance with compensation see PARA 948 et seq post.

7 See Gilbert's History and Practice of Chancery 240-242, citing *Earl of Feversham v Watson* (1680) Cas temp Finch 445; *Medith v Wynn* (1711) 1 Eq Cas Abr 70. See also 1 Fonblanque's Treatise of Equity 385-386; Story's Equity Jurisprudence (14th Edn) 1060-1062.

8 *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495.



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### (iii) Plaintiff 's Obligations

#### 884. Effect of non-performance of terms of contract.

In addition to conditions<sup>1</sup>, the plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication<sup>2</sup>, and which he ought to have performed at the date of the writ in the action<sup>3</sup>. This rule, however, only applies to terms which are essential and considerable<sup>4</sup>. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term<sup>5</sup>, although in such cases it may grant compensation<sup>6</sup>.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim<sup>7</sup>.

1 As to conditions see PARA 879 et seq ante.

2 *Tildesley v Clarkson* (1862) 30 Beav 419. Distinguish *Chappell v Gregory* (1864) 34 Beav 250, where no such term was held to be implied.

3 *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, [1974] 1 WLR 68, CA; *Cole v Rose* [1978] 3 All ER 1121, DC; *Singh (Sudagar) v Nazeer* [1979] Ch 474, [1978] 3 All ER 817. Cf *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169.

4 *Modlen v Snowball* (1861) 4 De GF & J 143; *Reeves v Greenwich Tanning Co Ltd* (1864) 2 Hem & M 54.

5 *Dyster v Randall & Sons* [1926] Ch 932 at 942-943. Nevertheless the plaintiff might on that ground have failed in an action at law: *Davis v Hone* (1805) 2 Sch & Lef 341 at 347; see *Craven v Tickell* (1789) 1 Ves 60 (small deviation from agreed plan); *Lord v Stephens* (1835) 1 Y & C Ex 222. It seems that *Oxford v Provand* (1868) LR 2 PC 135 ought to be considered as emphasising the distinction between essential and non-essential terms.

6 As to specific performance with compensation see PARA 948 et seq post.

7 *Williams v Brisco* (1882) 22 ChD 441, CA. Cf *Holmes v Trench* [1898] 1 IR 319.

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### **885. Separate and collateral contract.**

The plaintiff may enter into a contract which is separate from but collateral to the contract which he seeks specifically to enforce. Where the plaintiff does so, it is not open to the defendant to say that specific performance should be dependent on the performance of the collateral contract, even though it relates to the same subject matter<sup>1</sup>. For example, there may be independent<sup>2</sup> covenants in the same contract, non-performance of one of which does not prevent enforcement of performance of the other covenants<sup>3</sup>.

1 *Phipps v Child* (1857) 3 Drew 709.

2 As to dependent and independent covenants generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 266 et seq.

3 *Green v Low* (1856) 22 Beav 625, where a contract for a lease and also for an option to purchase were held to be independent. Cf *Raffety v Schofield* [1897] 1 Ch 937; *Starkey v Barton* [1909] 1 Ch 284. See also *Gibson v Goldsmid* (1854) 5 De GM & G 757, and distinguish *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA (interdependent covenants). Breach of an intended covenant in a lease may prevent a tenant under an agreement for a lease obtaining a lease: *Coatsworth v Johnson* (1886) 55 LJQB 220, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 77.

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**886. Waiver or wrongful act by the defendant.**

Non-performance by the plaintiff cannot be relied on by the defendant where he has waived performance<sup>1</sup>, or where the non-performance was caused by his breach of contract or by his preventing the plaintiff from performing his obligations under the contract<sup>2</sup>, or where his failure to perform specifically resulted in land being sold by the plaintiff 's mortgagees<sup>3</sup>.

1 *Lamare v Dixon* (1873) LR 6 HL 414. See also *Strong v Stringer* (1889) 61 LT 470, where rent was accepted after a breach of covenant.

2 *Hotham v East India Co* (1787) 1 Term Rep 638; *Murrell v Goodyear* (1860) 1 De GF & J 432, where a purchaser prevented the vendor from completing his title. See also CONTRACT vol 9(1) (Reissue) PARA 969.

3 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL: see PARA 892 post.

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**887. Waiver by plaintiff of term for his benefit.**

If there is a stipulation in a contract intended to benefit the plaintiff, he may waive it and obtain specific performance, provided the stipulation is in terms for the exclusive benefit of the plaintiff<sup>1</sup>.

<sup>1</sup> *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148; *Federated Homes Ltd v Turner* (1974) 233 Estates Gazette 845; *Balbosa v Ayoub Ali* [1990] 1 WLR 914, PC. Cf *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583.

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**(iv) Set-off**

**888. In general.**

A claim to specific performance will fail if it is dependent on the non-payment of a money claim to which there is a complete defence by way of a legal or equitable right of set-off. Thus where the plaintiff had a right to require the defendant to assign certain property to him if specified payments were not made, the plaintiff failed in his claim for specific performance, notwithstanding non-payment, where the defendant would have had a complete defence by way of set-off against the plaintiff's money claim<sup>1</sup>.

1 *BICC plc v Burndy Corp* [1985] Ch 232, [1985] 1 All ER 417, CA.

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## **(11) PLAINTIFF'S ACTS REPUDIATING OR INCONSISTENT WITH CONTRACT**

### **889. Effect of repudiation by the plaintiff.**

It is obvious that a plaintiff who has expressly repudiated his obligations under a contract is debarred from claiming specific performance of the contract by the other party<sup>1</sup>. The same principles apply where, although the plaintiff has not in express terms refused to perform his part of the contract, he has done acts which show an intention no longer to be bound by it, and which amount to a complete and total repudiation of everything which has to be done by him<sup>2</sup>. Thus where an employer has wrongfully dismissed his employee, he is not allowed to enforce against the employee, by specific performance or injunction, a restrictive covenant contained in the contract of employment<sup>3</sup>. However, the innocent party may refuse to terminate the contract and sue for specific performance<sup>4</sup>, though if he accepts a repudiatory breach the contract is at an end and specific performance ceases to be available<sup>5</sup>.

1 Cf para 879 et seq ante.

2 See CONTRACT vol 9(1) (Reissue) PARA 997 et seq; SALE OF LAND vol 42 (Reissue) PARA 232 note 2. See also *Freeth v Burr* (1874) LR 9 CP 208 at 213; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL; *James Shaffer Ltd v Findlay, Durham and Brodie* [1953] 1 WLR 106, CA; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757, [1979] 1 All ER 307, HL; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL.

3 See EMPLOYMENT vol 39 (2009) PARA 19.

4 Cf *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, where specific performance, however, became impossible: see PARA 892 post.

5 *Walker v Standard Chartered Bank plc, Jasaro SA v Standard Chartered Bank plc* [1992] BCLC 535, CA.



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### **890. Effect of acts done in contravention of contract.**

Where a plaintiff claiming specific performance of a contract acts in contravention of its terms, the court may refuse to enforce the contract in his favour; thus, where a vendor who has agreed to give immediate possession retakes possession, he is not entitled to specific performance<sup>1</sup>. Similarly, where there is an agreement for a lease and the lessee commits breaches of the terms of the agreement, such as waste<sup>2</sup>, failure to insure or repair<sup>3</sup>, or, if the agreement is for a sublease, knowingly commits acts which are inconsistent with the covenants of the head lease<sup>4</sup>, the contract is not specifically enforced. So, also, a covenant to renew is not enforced where the lessee has been guilty of breaches of the expiring lease<sup>5</sup>.

In the past it has been said that to constitute a bar to specific performance, such acts must be gross and wilful<sup>6</sup>; and in relation to leases they must, as a rule, be not only such as would work a forfeiture of the legal interest, but also such that the court would not relieve against the forfeiture<sup>7</sup>. Today it is more likely, even in a claim for equitable relief, that a court will consider not only the nature of the particular term which is breached<sup>8</sup>, but also the consequences which flow from the breach in determining whether to grant specific performance<sup>9</sup>. Consequently specific performance may be granted where the wrongful acts are trifling<sup>10</sup> or, in relation to leases, are such that the court would relieve against a forfeiture of the legal estate<sup>11</sup>.

1 *Knatchbull v Grueber* (1815) 1 Madd 153; affd (1817) 3 Mer 124. Cf *Royou v Paul* (1858) 28 LJ Ch 555 (vendor giving notice of intention to resell) (explained in *Laughton v Port Erin Comrs* [1910] AC 565, PC); *Bedford and Cambridge Rly Co v Stanley* (1862) 2 John & H 746, where a railway company agreed to purchase land, then resorted to compulsory powers, and it was held that such resort was inconsistent with the agreement and a bar to the company's enforcing it. See also *Blackett v Bates* (1865) 1 Ch App 117, where it was doubted whether proceedings to set aside an award would not be a bar to a subsequent claim to enforce it specifically.

2 See *Hill v Barclay* (1811) 18 Ves 56 at 63; *Gregory v Wilson* (1852) 9 Hare 683; *Lewis v Bond* (1853) 18 Beav 85. Apparently, a gross instance of waste would have this result even where the lease, if executed, would not have contained a proviso for re-entry: *Gourlay v Duke of Somerset* (1812) 1 Ves & B 68 at 73.

3 *Nunn v Truscott* (1849) 3 De G & Sm 304; *Gregory v Wilson* (1852) 9 Hare 683.

4 *Lewis v Bond* (1853) 18 Beav 85.

5 *Thompson v Guyon* (1831) 5 Sim 65; *Greville v Parker* [1910] AC 335, PC: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 95, 539.

6 *Hare v Burges* (1857) 5 WR 585; *Parker v Taswell* (1858) 2 De G & J 559.

7 As to relief against forfeiture see EQUITY vol 16(2) (Reissue) PARA 804 et seq; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 513 et seq.

8 *A/S Awilco v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314, HL. Cf *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL.

9 Cf *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL, explaining *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, CA.

10 *Besant v Wood* (1879) 12 ChD 605 (separation deed). See also *Gorton v Smart* (1822) 1 Sim & St 66; *Trant v Dwyer* (1828) 2 Bli NS 11, HL; *Walker v Jeffreys* (1842) 1 Hare 341; *Holmes v Eastern Counties Rly Co* (1857) 3 Jur NS 737; *Hare v Burges* (1857) 5 WR 585; *Parker v Taswell* (1858) 2 De G & J 559.

11 *Parker v Taswell* (1858) 2 De G & J 559.



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## **(12) CLEAN HANDS**

### **891. Application of equitable maxim.**

A party resisting a grant of specific performance on the ground of misconduct by the party seeking it must show that the conduct itself was wanting in good faith and was in the transaction which is the basis of the suit. Where there are alleged improprieties on both sides, the court should first decide whether there has been any relevant want of faith, honesty or righteous dealing on the part of the person seeking relief and should then decide whether as a matter of discretion and in all the circumstances, which might include any relevant misconduct on the part of the person resisting relief, it is right to refuse to grant specific performance. No balancing act, however, falls to be performed<sup>1</sup>.

<sup>1</sup> *Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd* (1983) 127 Sol Jo 410, PC; *Cross v Cross* (1983) 4 FLR 235. See also *Wilton Group plc v Abrams*, *Abrams v Samuelson* [1991] BCLC 315. A defence alleging that a wife claiming specific performance did not come to equity with clean hands because of the conduct of her husband was rightly held to be unarguable in *Boulding Group plc v Newett* (1991) Independent, 24 June, CA. See further EQUITY vol 16(2) (Reissue) PARA 560.

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## **(13) PERFORMANCE BY THE DEFENDANT MADE IMPOSSIBLE**

### **892. Frustration and impossibility.**

A contract may be frustrated and become impossible to perform<sup>1</sup> because of the occurrence of an unexpected event which destroys the foundation of the contract. The contract is then discharged and specific performance is out of the question<sup>2</sup>. At law it is no defence to an action for damages that the contract has become impossible of performance through the defendant's own acts, but in equity specific performance will be denied<sup>3</sup>. Again, it is a defence to an action for specific performance that the defendant (who is generally a vendor of land) is not able to put an end to the rights of a third person over the land or to compel him to concur in the conveyance<sup>4</sup>. However, a vendor must do his best to obtain any necessary consents<sup>5</sup>. He must take proceedings to eject a tenant by sufferance, a tenant at will or a trespasser who has no right to be there<sup>6</sup>, but he need not embark on any dangerous and uncertain litigation to secure any consents; thus a husband need not take legal proceedings against his wife in order to secure her eviction from the matrimonial home<sup>7</sup>.

Circumstances may radically change after the making of the contract, but not so radically as to discharge the contract at law. Nevertheless equity may then refuse specific performance on the ground that it would be harsh and oppressive to grant it<sup>8</sup>.

If, however, the impossibility does not relate to the substance of the contract, the court may order the defendant to perform the contract so far as he can<sup>9</sup> and pay compensation for the part unperformed<sup>10</sup>.

1 As to the effect of impossibility of performance and frustration on contracts generally see CONTRACT vol 9(1) (Reissue) PARA 894 et seq. As to frustration in relation to leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 601.

2 See CONTRACT vol 9(1) (Reissue) PARA 894 et seq.

3 *Green v Smith* (1738) 1 Atk 572 at 573; *Denton v Stewart* (1786) 1 Cox Eq Cas 258; *Smith v Morris* (1788) 2 Bro CC 311; *Ferguson v Wilson* (1866) 2 Ch App 77. Cf *Ellis v Colman, Bates and Husler* (1858) 25 Beav 662; *Wycombe Rly Co v Donnington Hospital* (1866) 1 Ch App 268; *Castle v Wilkinson* (1870) 5 Ch App 534. Cf *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also PARA 889 ante.

4 *Wroth v Tyler* [1974] Ch 30 at 48, [1973] 1 All ER 897 at 911; *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528. See also *Lehmann v McArthur* (1868) 3 Ch App 496.

5 Cf *Costigan v Hastler* (1804) 2 Sch & Lef 159 at 166; *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA.

6 For the form of order in such a case see *Wroth v Tyler* [1974] Ch 30 at 51, [1973] 1 All ER 897 at 913.

7 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897.

8 See PARA 863 ante.

9 *Errington v Aynesly* (1788) 2 Bro CC 340, where there was a contract to build a bridge, but it proved impossible to lay the foundations, and it was ordered that the bridge be built on the nearest possible site and that compensation be paid. Cf *A-G v Day* (1749) 1 Ves Sen 218 at 224 per Lord Eldon LC; *Paxton v Newton* (1854) 2 Sm & G 437; *Barnes v Wood* (1869) LR 8 Eq 424.

10 As to compensation see PARA 948 et seq post.



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### **893. Time at which impossibility is judged.**

The time at which impossibility is judged is the proper time for performance of the contract, not the date of the contract<sup>1</sup>.

<sup>1</sup> For instance, if a person enters into a contract which at the time he is not able to perform, but afterwards becomes able to do so, he is bound to perform it. Thus a person may contract to convey an estate on a future day even though he is not the owner of the estate at the date of the contract, or similarly may contract to sell goods which are not then his property. Such contracts would be enforced if the vendor has become possessed of the land or goods: see *Browne v Warner* (1808) 14 Ves 409 at 412; *Carne v Mitchell* (1846) 10 Jur 909; *Holroyd v Marshall* (1862) 10 HL Cas 191; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 54-55; SALE OF LAND vol 42 (Reissue) PARA 137. As to the validity of such contracts at law see *Cuddee v Rutter* (1720) 5 Vin Abr 538, pl 21 (which appears inconsistent with the later authorities); *Hibblewhite v M' Morine* (1839) 5 M & W 462; *De Medina v Norman* (1842) 9 M & W 820; and cf *Clayton v Duke of Newcastle* (1682) 2 Cas in Ch 112. Similarly, where contracts dealing with property require parliamentary sanction for their performance, the court protects the property while the sanction is being obtained: *Frederick v Coxwell* (1829) 3 Y & J 514; *Great Western Rly Co v Birmingham and Oxford Junction Rly Co* (1848) 2 Ph 597; *Hawkes v Eastern Counties Rly Co* (1852) 1 De GM & G 737; *Devenish v Brown* (1856) 26 LJ Ch 23. In *Walker v Barnes* (1818) 3 Madd 247, where an indemnity was to be secured on real property, the court rejected the plea that the contractor had not sufficient realty and ordered him to purchase sufficient to enable him to give the security. Cf *Carey v Stafford* (1725) 3 Swan 427n.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(14) RESCISSION OR VARIATION OF THE CONTRACT/894. Rescission generally.

## **(14) RESCISSION OR VARIATION OF THE CONTRACT**

### **894. Rescission generally.**

A contract may be rescinded or an apparent contract may be nullified by reason of mistake<sup>1</sup>, duress<sup>2</sup>, fraud<sup>3</sup>, undue influence<sup>4</sup> or misrepresentation<sup>5</sup>. In such instances, if the contract is void, or is voidable and is avoided, there can be no question of specific performance.

1 See CONTRACT vol 9(1) (Reissue) PARAS 703-708; MISTAKE vol 32 (2005 Reissue) PARAS 43-48.

2 See CONTRACT vol 9(1) (Reissue) PARA 710; EQUITY vol 16(2) (Reissue) PARA 436.

3 See EQUITY vol 16(2) (Reissue) PARAS 412-414, 416; MISREPRESENTATION AND FRAUD generally.

4 See CONTRACT vol 9(1) (Reissue) PARA 712; EQUITY vol 16(2) (Reissue) PARA 417 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

5 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

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**895. Variation distinguished from rescission.**

If a contract is required to be in writing<sup>1</sup>, oral evidence of an agreement to vary its terms cannot be admitted<sup>2</sup>. On principle, however, a new contract which completely replaces the original one may be set up as a defence to a claim for specific performance of the original contract on the ground that the original has been rescinded by mutual consent<sup>3</sup>.

- 1 As to this requirement see the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 858 ante.
- 2 *O' Connor v Spaight* (1804) 1 Sch & Lef 305; *Price v Dyer* (1810) 17 Ves 356; *Robinson v Page* (1826) 3 Ves 114; *Emmet v Dewhurst* (1851) 3 Mac & G 587 (agreement to pay composition); *Vezey v Rashleigh* [1904] 1 Ch 634. Cf *Morrell v Studd and Millington* [1913] 2 Ch 648, where a written offer contained, in addition to terms required by the Law of Property Act 1925 s 40 (repealed), a time-limit for acceptance, and it was held that an agreement to extend the time for acceptance need not be in writing.
- 3 *Morris v Baron & Co* [1918] AC 1 at 28, HL. See also PARA 896 post.



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**896. Novation.**

Specific performance is refused where a contract has been rescinded by novation; that is, where the parties have come to a fresh agreement for good consideration which from its nature must be presumed to be in substitution for the former agreement<sup>1</sup>.

<sup>1</sup> *Robson v Collins* (1802) 7 Ves 130; *Moore v Marrable* (1866) 1 Ch App 217.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(14) RESCISSION OR VARIATION OF THE CONTRACT/897. Rescission by the vendor under express contractual power.

### **897. Rescission by the vendor under express contractual power.**

A form of rescission which has frequently arisen in actions for specific performance is rescission in exercise of an express power under the contract<sup>1</sup>. In order that the rescission may be effective, the exact limits of the power must be observed<sup>2</sup>. Unjustified rescission may not amount to repudiation if there is evidence that the party purporting to rescind was relying on the contract and not abandoning or refusing to perform it<sup>3</sup>. A power to rescind under the contract is not construed as giving an arbitrary or capricious right<sup>4</sup>. A party may waive his right to rescind<sup>5</sup> or by his conduct lose the right to do so<sup>6</sup>.

<sup>1</sup> For a discussion of such cases in contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARAS 104-108.

<sup>2</sup> See eg the cases cited in SALE OF LAND vol 42 (Reissue) PARAS 104 note 7, 105 note 3. Such a power is not inconsistent with a clause for compensation (*Nelthorpe v Holgate* (1844) 1 Coll 203; *Painter v Newby* (1853) 11 Hare 26; *Mawson v Fletcher* (1870) LR 10 Eq 212 (affd 6 Ch App 91); *Ashburner v Sewell* [1891] 3 Ch 405), and may be exercised without notice of an intention to do so (*Duddell v Simpson* (1866) 2 Ch App 102; *Re Dames and Wood* (1885) 29 ChD 626, CA).

<sup>3</sup> *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL.

<sup>4</sup> See eg *Duddell v Simpson* (1866) 2 Ch App 102; *Re Dames and Wood* (1885) 29 ChD 626, CA; *Re Starr-Bowkett Building Society and Sibun's Contract* (1889) 42 ChD 375, CA; *Re Jackson and Haden's Contract* [1906] 1 Ch 412, CA; *Quinion v Horne* [1906] 1 Ch 596; *Re Milner and Organ's Contract* (1920) 89 LJ Ch 315. These cases show that where a vendor has the power to rescind, if unwilling to comply with a purchaser's objections, it is enough (if he acted in good faith) to show reasonable grounds of difficulty or expense. Cf *Woolcott v Peggie* (1889) 15 App Cas 42, PC, and distinguish *Merrett v Schuster* [1920] 2 Ch 240, where a vendor was allowed to rescind notwithstanding that he had made an untrue statement of fact about the property, the statement being made in good faith and with some substantial ground for belief in its truth. See also SALE OF LAND vol 42 (Reissue) PARA 106, and cf *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; and PARAS 899-900 post.

<sup>5</sup> See PARA 881 ante.

<sup>6</sup> *Re Jackson and Haden's Contract* [1906] 1 Ch 412, CA.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(14) RESCISSION OR VARIATION OF THE CONTRACT/898. Repudiation.

### **898. Repudiation.**

Where one party has by words or conduct shown an intention no longer to be bound by the contract, the other party is entitled to treat the words or conduct as a repudiation or refusal to perform on the part of the former party, and to accept such repudiation<sup>1</sup>. The contract is then determined; the injured party has elected not to seek specific performance and relies on his right of action for damages<sup>2</sup>. However, a party who has committed a repudiatory breach may enforce the contract if he remedies the breach before the repudiation is accepted<sup>3</sup>. His contention that the contract is determined is not necessarily a breach of contract<sup>4</sup>.

1 A refusal may be given before performance is due: *Hochster v De La Tour* (1853) 2 E & B 678; *Harold Wood Brick Co v Ferris* [1935] 2 KB 198 at 205-206, 208, CA. A party to a contract who wishes to avail himself of an act of repudiation by the other party must signify his election to do so with every reasonable dispatch, and where a purchaser in his defence to an action by the vendor for specific performance has pleaded that he was willing to complete on the right interpretation of the contract, it is too late for him to seek at the trial to amend that offer and ask for rescission and recovery of his deposit on the ground that the plaintiff, by his conduct in insisting upon a wrong interpretation, had repudiated the contract and had thereby given the defendant the option to accept that repudiation: *Berners v Fleming* [1925] Ch 264, CA.

2 Cf *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 at 365, CA, per Bowen LJ. As to repudiation of contracts generally see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

3 *Singh (Sudagar) v Nazeer* [1979] Ch 474, [1978] 3 All ER 817.

4 *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL. See PARA 897 ante.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(15) LAPSE OF TIME/(i) Time of the Essence of the Contract/899. When time is made of the essence of a contract.

## (15) LAPSE OF TIME

### (i) Time of the Essence of the Contract

#### 899. When time is made of the essence of a contract.

In the past, stipulations in a contract as to time were construed differently at law and in equity<sup>1</sup>. It is now provided by statute that in the event of a conflict the rules of equity are to prevail<sup>2</sup>. It has been held that these statutory provisions, and their predecessors, make it clear that there is now only one set of rules for the courts to apply<sup>3</sup>.

Time is always of the essence of a unilateral contract because the offeree's acceptance must scrupulously observe the terms of the offer; so an option to renew a lease or to terminate a lease (the so-called 'break-clause') must be punctually exercised because the offeror must know with certainty whether or not the option has been exercised so that he may, if he so wishes, dispose of the property to another<sup>4</sup>.

In a bilateral or synallagmatic contract time is of the essence if:

- 18 (1) the parties state expressly that stipulations as to the time by which any step provided for by the particular clause is to be taken are treated as being of the essence<sup>5</sup>; or it may be implied from the interrelationship of the particular clause or clauses with the other clauses of the contract or from the surrounding circumstances that the parties have agreed that the time is to be of the essence<sup>6</sup>;
- 19 (2) time was made of the essence by subsequent notice<sup>7</sup>;
- 20 (3) the delay has been so great as to be evidence of an abandonment of the contract<sup>8</sup>, although delay has no such effect if waived by the conduct of the parties<sup>9</sup>.

Although actions founded on simple contract are subject to a six years' statutory limitation period<sup>10</sup>, claims for specific performance strictly do not come within this provision<sup>11</sup>. However, courts of equity may by analogy apply this six-year limitation period to claims for specific performance<sup>12</sup>.

1 Supreme Court of Judicature Act 1873 s 25(7) (repealed); Law of Property Act 1925 s 41; and see CONTRACT vol 9(1) (Reissue) PARA 931.

2 Supreme Court Act 1981 s 49(1).

3 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 924, 927, 937, 944-945, 949, 957, [1977] 2 All ER 62 at 68, 70, 77-78, 83-84, 88, 93-94, HL.

4 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 929, 945, 951-952, [1977] 2 All ER 62 at 71, 84, 88-90, HL. See *Chiltern Court (Baker Street) Residents Ltd v Wallbrook Property Co Ltd* [1988] 2 EGLR 253.

5 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL. See also *Baynham v Guy's Hospital* (1796) 3 Ves 295, where the right of renewal of the lease was forfeited; *Honeyman v Marryat* (1855) 21 Beav 14 (affd (1857) 6 HL Cas 112); *Hudson v Temple* (1860) 29 Beav 536, where the vendor was at liberty to rescind if the purchase was not

completed by the date specified; *Barclay v Messenger* (1874) 43 LJ Ch 449, which shows that if time is originally of the essence but is extended, the substituted time is also essential; *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC, where time was originally of the essence but the stipulation was waived; *Stickney v Keeble* [1915] AC 386, HL; *Steedman v Drinkle* [1916] 1 AC 275, PC; *Brickles v Snell* [1916] 2 AC 599, PC; *Guerin v Heffernan* [1925] 1 IR 57; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. Cf *Re Sandwell Park Colliery Co, Field v The Co* [1929] 1 Ch 277 at 284 et seq. Equity does not apply its liberal views as to time to the performance of a condition: *Re Sandwell Park Colliery Co, Field v The Co* supra at 282 per Maugham J; *Factory Holdings Group Ltd v Leboff International Ltd* [1987] 1 EGLR 135 (rent review clause). See also *Lock v Bell* [1931] 1 Ch 35; *Harold Wood Brick Co v Ferris* [1935] 2 KB 198, CA. But merely specifying a date for performance is not enough: *Vernon v Stephens* (1722) 2 P Wms 66; *Hearne v Tenant* (1807) 13 Vest 287; *Roberts v Berry* (1852) 16 Beav 31 (affd (1853) 3 De GM & G 284); *Parkin v Thorold* (1852) 16 Beav 59. See also SALE OF LAND vol 42 (Reissue) PARA 120.

6 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL. See PARA 900 post. See also *Parkin v Thorold* (1852) 16 Beav 59 at 65.

7 See PARA 901 post.

8 See PARA 902 post.

9 See PARA 904 post. See also the Limitation Act 1980 s 36(2); and cf LIMITATION PERIODS vol 68 (2008) PARA 906. As to synallagmatic contracts see further CONTRACT vol 9(1) (Reissue) PARA 606.

10 Ibid s 5: cf LIMITATION PERIODS vol 68 (2008) PARA 955 et seq.

11 Ibid s 36(1): cf LIMITATION PERIODS vol 68 (2008) PARA 954.

12 Ibid s 36(1): cf LIMITATION PERIODS vol 68 (2008) PARA 954. See *Firth v Slingsby* (1888) 58 LT 481 at 483. Cf *Talmash v Mugleston* (1826) 4 LJOS 200, where it was held that actions for specific performance were not subject to a six-year limitation period. In practice they are subject to a shorter limitation period: see PARA 902 post. See also EQUITY vol 16(2) (Reissue) PARAS 919-920.

## UPDATE

### 899 When time is made of the essence of a contract

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

NOTE 4--As to the exercise of an option to purchase land, see *Di Luca v Juraise (Springs) Ltd* [1998] 18 EG 131, CA.

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### **900. When time is of the essence of a contract.**

Time is of the essence of the contract if the parties have expressly stipulated that it should be so<sup>1</sup>. The intention of the parties may also be implied from the interrelationship of various clauses of the contract or otherwise from the surrounding circumstances<sup>2</sup>.

If a party has stipulated that, as to certain provisions in his favour, time is to be of the essence of the contract, *prima facie* the court will hold time as essential in respect of other provisions which are against him<sup>3</sup>.

The court may also infer an intention of the parties to treat time as essential by reason of the nature of the contract. Such an intention is inferred in contracts in respect of a reversionary interest<sup>4</sup>, or contracts for the sale of land to be used directly for purposes of trade and commerce<sup>5</sup>, and, in particular, public houses as going concerns<sup>6</sup>, and of mines<sup>7</sup>, or contracts relating to things which are subject to fluctuations in value<sup>8</sup>. That time is of the essence may also be inferred from the surrounding circumstances in contemplation of which the contract is made, for example the purchase of a reversionary interest which becomes progressively more valuable<sup>9</sup> or a house for immediate occupation as a residence<sup>10</sup>. In all these instances delay in completing the contract would involve hardship to the other party<sup>11</sup>. In contrast, a provision that the purchaser is to pay interest on the purchase money in the event of non-completion by the day appointed is a sufficient indication that the time fixed for completion was not intended to be of the essence of the contract<sup>12</sup>. Similarly, if a clause in a contract which makes a time stipulation as to the exercise of a right is entered into for the benefit of both parties (such as a rent review clause), then time is not presumptively of the essence of the contract unless the delay is so prolonged as to deprive the other party of substantially the whole benefit which it was intended that he should obtain under the contract<sup>13</sup>.

1 See PARA 899 ante.

2 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; *Hammond v Allen* [1994] 1 All ER 307.

3 *Seaton v Mapp* (1846) 2 Coll 556 at 564 ('the plaintiffs' proposition is that the purchaser shall be held by a cable, and the vendors by a skein of silk'); *Upperton v Nickolson* (1871) 6 Ch App 436, where time was specified to be of the essence in the case of the purchaser's obligation, but not of the vendors; *C Richards & Son v Karenita Ltd* (1971) 221 Estates Gazette 25, where the tenant's right to break the lease was interlocked with the landlord's right to serve a notice for rent review, as interpreted in *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 962, [1977] 2 All ER 62 at 98, HL. Cf *Re Todd and M' Fadden's Contract* [1908] 1 IR 213.

4 *Newman v Rogers* (1793) 4 Bro CC 391; *Spurrier v Hancock* (1799) 4 Ves 667. Cf *Levy v Stogdon* [1899] 1 Ch 5, CA, and distinguish *Patrick v Milner* (1877) 2 CPD 342 (special conditions).

5 *Wright v Howard* (1823) 1 Sim & St 190 (mills); *Coslake v Till* (1826) 1 Russ 376; *Walker v Jeffreys* (1842) 1 Hare 341; *Dyas v Rooney* (1890) 27 LR 1r 4 (1r CA) (pasture land for stocking).

6 *Cowles v Gale* (1871) 7 Ch App 12, CA. Cf *Seaton v Mapp* (1846) 2 Coll 556; *Day v Luhke* (1868) LR 5 Eq 336; *Claydon v Green* (1868) LR 3 CP 511; *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch 705 at 711 per Romer J; *Lock v Bell* [1931] 1 Ch 35 (sale to be completed 'on or about' a specified date).

7 *City of London v Mitford* (1807) 14 Ves 41 at 58; *Parker v Frith* (1819) 1 Sim & St 199n; *Walker v Jeffreys* (1842) 1 Hare 341; *Eads v Williams* (1854) 4 De GM & G 674; *MacBryde v Weekes* (1856) 22 Beav 533; *Clegg v Edmondson* (1857) 8 De GM & G 787; *Alloway v Braine* (1859) 26 Beav 575; *Huxham v Llewellyn* (1873) 21 WR 570 at 766; *Glasbrook v Richardson* (1874) 23 WR 51; *Nicholson v Smith* (1822) 22 ChD 640.

8 *Withy v Cottle* (1823) Turn & R 78 (annuities); *Doloret v Rothschild* (1824) 1 Sim & St 590 (government stock); *Payne v Banner* (1846) 15 LJ Ch 227 (contract relating to patents); *Pollard v Clayton* (1855) 1 K & J 462 (coal). The position is similar in the case of contracts relating to shares: see *Sparks v Liverpool Waterworks Co* (1807) 13 Ves 428; *Campbell v London and Brighton Rly Co* (1846) 5 Hare 519; *Re Schwabacher, Stern v Schwabacher, Koritschoner's Claim* (1907) 98 LT 127 at 129; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA (highly speculative shares; commercial transaction). Where no time is fixed, the obligation is to deliver in a reasonable time: *De Waal v Adler* (1886) 12 App Cas 141, PC; and see COMPANIES vol 15 (2009) PARA 1715.

9 *Newman v Rogers* (1793) 4 Bro CC 391.

10 *Seaton v Mapp* (1846) 2 Coll 556; *Nokes v Lord Kilmorey* (1847) 1 De G & Sm 444; *Tilley v Thomas* (1867) 3 Ch App 61. However, this inference may be excluded by the conditions of the contract: see *Webb v Hughes* (1870) LR 10 Eq 281. The purchaser's motives will not be taken into consideration in construing stipulations as to time unless they are expressed in the contract or were made known to the vendor: *Boehm v Wood* (1820) 1 Jac & W 419; *Nokes v Lord Kilmorey* supra.

11 *Coslake v Till* (1826) 1 Russ 376; *Carter v Dean of Ely* (1834) 7 Sim 211, where the contract was for the grant of a lease by an ecclesiastical corporation for a consideration divisible among the existing members; *Roberts v Berry* (1853) 3 De GM & G 284; *Green v Sevin* (1879) 13 Ch 589. See SALE OF LAND vol 42 (Reissue) PARA 120.

12 *Patrick v Milner* (1877) 2 CPD 342; *Hatten v Russell* (1888) 38 ChD 334.

13 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL, overruling *Samuel Properties (Developments) Ltd v Hayek* [1972] 3 All ER 473, [1972] 1 WLR 1296, CA, and *Mount Charlotte Investments Ltd v Leek and Westbourne Building Society Ltd* [1976] 1 All ER 890.

## UPDATE

### 900 When time is of the essence of a contract

TEXT AND NOTE 13--However, a stipulation that a contract ceases to be enforceable after a certain period precludes both an action for performance and an action for damages founded upon that contract: *Smith v Lindsay & Kirk* (2000) Times, 16 March.

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### **901. Time made of the essence by notice.**

Even though time is not of the essence of the contract, it may be made so by notice given by one party to the contract to the other. If the contract for the sale of property fixed a date for completion or performance of some intermediate obligation, such as delivery of an abstract of title, the failure of one party to the contract either to complete or to perform the intermediate obligation by the stipulated date entitles the other party then and there to serve a notice making time of the essence, even though the time fixed by the contract was not of the essence of the contract<sup>1</sup>. He does not have to wait until there has been unreasonable delay by the party in breach before serving such a notice<sup>2</sup>. In the case of an open contract where no date for completion or for the performance of any intermediate obligation is fixed, the law implies a term that the contract will be completed or the obligation performed within a reasonable time from the date of the contract. In this case, a notice making time of the essence of the contract cannot be given until there has been an unreasonable delay, because it is only then that there is a breach of the contract<sup>3</sup>. There may, of course, be a special provision in the conditions of sale of a particular contract<sup>4</sup>.

The notice must be clear and unequivocal<sup>5</sup>. It may, it seems, be given orally<sup>6</sup>. It must limit a time within which the party in default must perform his obligation and, if the notice fixes a time which in all the circumstances is reasonable, the time so fixed will be considered by the court as having become of the essence of the contract<sup>7</sup>.

Unless the contract otherwise provides, the time specified in the notice must be reasonable<sup>8</sup>. Whether the time given in the notice is reasonable is a question of fact<sup>9</sup> depending on the circumstances; for example, the person pressing for completion may have given a similar notice in the past, compliance with which he has waived, or there may be a special need for early completion or the parties may have been in negotiation as to the matter<sup>10</sup>. If, however, the contract provides for a specific period of notice which must be given for the purpose of making time of the essence, the question whether the specified period is reasonable in the circumstances does not arise<sup>11</sup>.

An action for specific performance may be begun before any notice making time of the essence has been served or has expired.

1 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA, disapproving *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 928, and following *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 (Aust HC); *Winchcombe Carson Trustee Co Ltd v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477 (NSW); *O' Sullivan v Moodie* [1977] 1 NZLR 643 (NZ SC); *Louinder v Leis* (1982) 149 CLR 509 (Aust HC); and see *Re Olympia & York Canary Wharf Ltd, American Express Europe Ltd v Adamson* [1993] BCC 154. As to payment of a deposit see *John Willmott Homes Ltd v Read* (1986) 51 P & CR 90. See also *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL.

2 Prior to *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA, it was thought that an innocent party could not serve a notice making time of the essence until there had been an unreasonable delay on the part of the other party: see *Taylor v Brown* (1839) 2 Beav 180; *King v Wilson* (1843) 6 Beav 124; *Benson v Lamb* (1846) 9 Beav 502; *Pegg v Wisden* (1852) 16 Beav 239; *Green v Sevin* (1879) 13 ChD 589; *Compton v Bagley* [1892] 1 Ch 313; *Stickney v Keeble* [1915] AC 386; *Irani (Jamshed Khodaram) v Burjorji Dhunjibhai* (1915) 32 TLR 156, PC; *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 928; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA; *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176, [1990] 1 WLR 445, CA. See CONTRACT vol 9(1) (Reissue) PARA 928 et seq; SALE OF LAND vol 42 (Reissue) PARA 120.



3 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA.

4 *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536. See *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853.

5 *Reynolds v Nelson* (1821) 6 Madd 18; *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176, [1990] 1 WLR 445, CA. The notice should require completion by the date named and state that in default the contract will be rescinded: *Hatten v Russell* (1888) 38 ChD 334 at 346.

6 *Nokes v Lord Kilmorey* (1847) 1 De G & Sm 444. Cf *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600.

7 *King v Wilson* (1843) 6 Beav 124. As to the question of reasonableness see *King v Wilson* supra; *Parkin v Thorold* (1852) 16 Beav 59; *Pegg v Wisden* (1852) 16 Beav 239; *Nott v Riccard* (1856) 22 Beav 307, where short notice was justified by the previous refusal of the party in default; *Wells v Maxwell* (1863) 32 Beav 408 (affd 33 LJ Ch 44); *Crawford v Toogood* (1879) 13 ChD 153; *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853, where the failure of an anticipated subsale for which the vendors were agents meant that notice to complete within 28 days, in accordance with the conditions of sale, was not reasonable and was therefore ineffective; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. Where the nature of the contract involves expedition, a notice that would in other cases be unreasonably short may suffice: see *MacBryde v Weekes* (1856) 22 Beav 533, where, in a contract to grant a mining lease, one month's notice was good; *Compton v Bagley* [1892] 1 Ch 313, where 14 days' notice was enough on the purchase of a farm for the purchaser's personal occupation. A notice conditionally waived revives on failure of the condition: *Stewart v Smith* (1824) 6 Hare 222n.

8 *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853.

9 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 946, [1977] 2 All ER 62 at 85, HL.

10 *Stickney v Keeble* [1915] AC 386 at 419, HL; *Ajit v Sammy* [1967] AC 255, PC.

11 *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.

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## **(ii) Acquiescence, Laches and Waiver**

### **902. Delay constituting evidence of abandonment.**

Where time is not originally of the essence of the contract and has not been made so by notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance<sup>1</sup>.

Normally the delay will arise from the plaintiff's failure to issue his writ in the action, but his laches may bar his equitable relief if, having issued the writ, he delays in bringing the action to trial<sup>2</sup>.

The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract<sup>3</sup>. Any period of delay may be fatal if it is delay in declaring an option or exercising any other unilateral right such as a tenant's right to exercise an option to determine a lease<sup>4</sup>; and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance<sup>5</sup>.

1 *Lloyd v Collett* (1793) 4 Bro CC 469; *Fordyce v Ford* (1794) 4 Bro CC 494; *Harrington v Wheeler* (1799) 4 Ves 686; *Moore v Blake* (1808) 1 Ball & B 62; *Eads v Williams* (1854) 4 De GM & G 674 at 691 per Lord Cranworth LC; *Rich v Gale* (1871) 24 LT 745; *Lamare v Dixon* (1873) LR 6 HL 414; *Dean v Upton* (1990) Times, 10 May, CA. Cf *Simpson v Connolly* [1953] 2 All ER 474, [1953] 1 WLR 911, where on an agreement to extinguish a debt which was conditional on certain land being transferred there was undue delay in transferring the land; *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch 305, [1983] 2 All ER 1067, CA. As to laches generally see EQUITY vol 16(2) (Reissue) PARA 910 et seq. See also LIMITATION PERIODS vol 68 (2008) PARA 906.

2 *Towli v Fourth River Property Co Ltd, Michaelides v Cormican Properties Ltd* (1976) Times, 24 November, where a delay of nine years between the issue of the writ and the hearing was fatal. Cf *Du Sautoy v Symes* [1967] Ch 1146 at 1168, [1967] 1 All ER 25 at 37, where three years' delay was not fatal.

3 *Marquis of Hertford v Boore* (1801) 5 Ves 719 (14 months' delay not a bar); *Southcomb v Bishop of Exeter* (1847) 6 Hare 213 (18 months' delay a bar); *Eads v Williams* (1854) 4 De GM & G 674 (lease of coal mines; three and a half years' delay a bar); *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* (1977) 121 Sol Jo 793 (delay of two years before issue of writ); see [1978] The Conveyancer and Property Lawyer 184. See *Lord James Stuart v London and North Western Ry Co* (1852) 1 De GM & G 721; *Moore v Marrable* (1866) 1 Ch App 217.

4 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL. See also *Brooke v Garrod* (1857) 3 K & J 608; *Lord Ranelagh v Mellon* (1864) 2 Drew & Sm 278; *Weston v Collins* (1865) 34 LJ Ch 353. Cf *Austin v Tawney* (1867) 2 Ch App 143; *Lord Darnley v London, Chatham and Dover Ry Co* (1867) LR 2 HL 43; *Nicholson v Smith* (1882) 22 ChD 640. The rule does not apply if no time is fixed originally: *Moss v Barton* (1866) LR 1 Eq 474; *Buckland v Papillon* (1866) 2 Ch App 67; *Re Adams and Kensington Vestry* (1883) 24 ChD 199; affd (1884) 27 ChD 394, CA.

5 *Heaphy v Hill* (1824) 2 Sim & St 29; *Watson v Reid* (1830) 1 Russ & M 236; *Parkin v Thorold* (1852) 16 Beav 59 at 73; *Lehmann v McArthur* (1868) 3 Ch App 496; *Huxham v Llewellyn* (1873) 21 WR 570, 766.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(15) LAPSE OF TIME/(ii) Acquiescence, Laches and Waiver/903. Delay in enforcing judgment.

**903. Delay in enforcing judgment.**

Leave to enforce a decree of specific performance will be refused if it is inequitable to the party in breach so to decree, as where the plaintiff has been guilty of extraordinary delay and has no reasonable explanation or excuse for allowing the judgment to remain unenforced for so long. If the plaintiff has acted reasonably in waiting, the mere fact that the defendant has suffered detriment through the lapse of time is not sufficient ground for refusing specific performance<sup>1</sup>.

<sup>1</sup> *Easton v Brown* [1981] 3 All ER 278, applying *McKenna v Richey* [1950] VLR 360 (Vict).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(15) LAPSE OF TIME/(ii) Acquiescence, Laches and Waiver/904. When delay is no bar to relief.

#### **904. When delay is no bar to relief.**

Delay does not bar a claim to specific performance if the plaintiff has been in substantial possession of the benefits under the contract, and is merely claiming the completion of the legal estate<sup>1</sup>, or if the delay is due to negotiations between the parties on the question in dispute<sup>2</sup>. Nor can the benefit of delay be claimed by the party causing it, for example where it has been caused by improper objections which he has taken<sup>3</sup>.

Delay may, however, be fatal when the contract which is the basis of the plaintiff's title is in dispute<sup>4</sup>. Moreover, the defence of delay is waived if, after such a lapse of time as would entitle a party to resist specific performance on that ground, the party so entitled proceeds to deal with the other party regardless of the delay<sup>5</sup>. He is held to have waived the defence only if he acted with full knowledge of the facts<sup>6</sup>.

1 *Crofton v Ormsby* (1806) 2 Sch & Lef 583 at 603; *Clarke v Moore* (1844) 1 Jo & Lat 723, where the tenant was in possession under an agreement, and delay was no bar to claiming specific performance of the agreement to accept the lease; *Burke v Smyth* (1846) 3 Jo & Lat 193; *Sharp v Milligan* (1856) 22 Beav 606; *Shepherd v Walker* (1875) LR 20 Eq 659; *Williams v Greatrex* [1956] 3 All ER 705, [1957] 1 WLR 31, CA, where a delay of ten years was not fatal. Such possession must purport to be under the contract and be recognised as such: *Mills v Haywood* (1877) 6 ChD 196, CA. Cf *Lamare v Dixon* (1873) LR 6 HL 414, where objections by the intending lessee were not waived by his continuing in possession and paying rent under protest. The mere leaving of a deposit does not constitute acquiescence on the part of a purchaser: *Watson v Reid* (1830) 1 Russ & M 236. See also *Voyce v Voyce* (1991) 62 P & CR 290, CA.

2 *Southcomb v Bishop of Exeter* (1847) 6 Hare 213; *Gee v Pearse* (1848) 2 De G & Sm 325; *McMurray v Spicer* (1868) LR 5 Eq 527.

3 *Morse v Merest* (1821) 6 Madd 26; *Shrewsbury and Birmingham Rly Co v London and North Western Rly Co etc* (1850) 2 Mac & G 324; *Monro v Taylor* (1852) 3 Mac & G 713.

4 *Joyce v Joyce* [1979] 1 All ER 175, [1978] 1 WLR 1170.

5 *Seton v Slade, Hunter v Seton* (1802) 7 Ves 265 (examining abstract after time expired); *King v Wilson* (1843) 6 Beav 124. Cf *Pincke v Curteis* (1793) 4 Bro CC 329; *Hudson v Bartram* (1818) 3 Madd 440 (waiver by accepting payment after forfeiture by nonpayment); *Hipwell v Knight* (1835) 1 Y & C Ex 401; *Re Eastern Counties Railway Act, ex p Gardner* (1841) 4 Y & C Ex 503; *Pegg v Wisden* (1852) 16 Beav 239; *Webb v Hughes* (1870) LR 10 Eq 281. See SALE OF LAND vol 42 (Reissue) PARA 102. Other instances of waiver by conduct are *Boehm v Wood* (1820) 1 Jac & W 419 at 420; *Cutts v Thodey* (1842) 13 Sim 206; *Eads v Williams* (1854) 4 De GM & G 674; but see *Barclay v Messenger* (1874) 43 LJ Ch 449, where there was held to be no waiver of the time of payment by giving permission before that time.

6 *Lord Darnley v London, Chatham and Dover Rly Co* (1863) 1 De GJ & Sim 204.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/2. DEFENCES TO CLAIMS FOR SPECIFIC PERFORMANCE/(16) PUBLIC POLICY/905. Enforcement contrary to public policy.

## **(16) PUBLIC POLICY**

### **905. Enforcement contrary to public policy.**

Specific performance may be denied if it would be contrary to public policy to enforce the contract specifically. The fact that the public would be misled as to the authorship of a literary work if the contract, which provided for the naming as author of a person who had not written the work, were to be performed has been held to be a good ground for refusing specific performance, for this would be fraud on the public<sup>1</sup>. More recently the court has not ordered specific performance of a contract if this would mean that there was a reasonable possibility that the plaintiff would be in a position to evict a husband and possibly his daughter, thereby splitting up the family<sup>2</sup>. In an appropriate case specific performance may also be refused where there is a risk of public disorder if a contract to grant a licence to use a public building were to be enforced<sup>3</sup>. Against such a consideration must be weighed the individual's right to exercise his freedom of speech and of assembly<sup>4</sup>.

1 *Post v Marsh* (1880) 16 ChD 395. Fry on Specific Performance (6th Edn) 343 suggests that the fraud of a third person, without the plaintiff's connivance, which induced the defendant to enter into the contract might be a sufficient defence. But there has been no such case, and in *Union Bank of London v Munster* (1887) 37 ChD 51, Jessel MR was sceptical whether such a defence could ever succeed.

2 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897, where the husband was the defendant: see PARA 872 ante.

3 Cf *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA, where this argument was rejected on the particular facts.

4 See *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA, where an injunction was refused on the ground of public interest; cf *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, CA, where an injunction was granted.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(i) Tribunals  
having Jurisdiction/906. The High Court.

### **3. PROCEEDINGS FOR SPECIFIC PERFORMANCE**

#### **(1) INSTITUTION OF PROCEEDINGS**

##### **(i) Tribunals having Jurisdiction**

##### **906. The High Court.**

Actions for the specific performance of contracts relating to the sale, exchange or partition of land<sup>1</sup> or the raising of charges on land<sup>2</sup> are expressly assigned to the Chancery Division<sup>3</sup>. Actions for the specific performance of an agreement relating to the carriage of goods in a ship<sup>4</sup> or to the use or hire of a ship<sup>5</sup> are assigned to the Queen's Bench Division and taken by the Admiralty Court<sup>6</sup>. Actions for the specific performance of contracts of any other kind may be instituted at the plaintiff's option in any Division of the High Court<sup>7</sup> subject to the power to transfer actions from one Division to another<sup>8</sup> or from the High Court to a county court<sup>9</sup>. If a counterclaim for specific performance<sup>10</sup> of a contract relating to the sale, exchange or partition of land is raised in proceedings commenced in the Queen's Bench Division, the court will generally accede to an application for transfer of the proceedings to the Chancery Division<sup>11</sup>.

1 As to the formation of contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 23 et seq; as to specific performance of contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 247 et seq; and as to the exchange of land see REAL PROPERTY vol 39(2) (Reissue) PARA 240 et seq.

2 As to charges on land see MORTGAGE vol 32 (2005 Reissue) PARA 459 et seq.

3 Supreme Court Act 1981 s 61(1), Sch 1 para 1(a). For the meaning of 'land' see PARA 801 note 15 ante. As to the assignment of proceedings to the Chancery Division generally see CIVIL PROCEDURE vol 11 (2009) PARA 44.

4 As to the carriage of goods by sea see *Petrofina SA v AOT Ltd, The Maersk Nimrod* [1992] QB 571, [1991] 3 All ER 161; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq.

5 As to contracts for the hire of a ship see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 111 et seq.

6 Supreme Court Act 1981 ss 20(1)(a), (2)(h), 62(2), Sch 1 para 2(c). As to the Admiralty jurisdiction of the High Court see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 79 et seq.

7 See *ibid* s 64; and CIVIL PROCEDURE vol 11 (2009) PARA 48. In practice, specific performance actions are not heard in the Family Division, since specific performance of an agreement relating to any matters involving the upbringing of a child will not be granted: see PARA 831 ante.

8 See *ibid* s 65; and CIVIL PROCEDURE vol 11 (2009) PARA 48.

9 See the County Courts Act 1984 s 40 (substituted by the Courts and Legal Services Act 1990 s 2(1)); and CIVIL PROCEDURE vol 11 (2009) PARA 69.

10 As to counterclaims for specific performance see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

11 *Hillman v Mayhew* (1876) 1 Ex D 132; *Holloway v York* (1877) 2 Ex D 333, CA; *London Land Co v Harris* (1884) 13 QBD 540. *Cf Storey v Waddle* (1879) 4 QBD 289, CA.

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## **906 The High Court**

NOTES 3, 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(i) Tribunals  
having Jurisdiction/907. County courts.

## **907. County courts.**

A county court<sup>1</sup> has jurisdiction to hear and determine proceedings for the specific performance of any agreement for the sale, purchase or lease of property<sup>2</sup> where, in the case of a sale or purchase, the purchase money<sup>3</sup> or, in the case of a lease, the value of the property<sup>4</sup> does not exceed the county court limit<sup>5</sup>, or where the parties have agreed that a specified county court is to have jurisdiction in the proceedings<sup>6</sup>. Actions commenced in a county court may be transferred to the High Court by order of the High Court or of any county court<sup>7</sup>.

A county court may also grant a mandatory injunction which operates in effect as a specific performance order as ancillary relief in an action claiming damages for breach of contract within the statutory jurisdiction of the court<sup>8</sup>.

1 As to the appropriate county court in which to commence proceedings see CCR Ord 4 r 2(1); and cf COURTS. As to transfers between county courts see Ord 16 Pt I (rr 1-5); and cf COURTS.

2 As to specific performance of contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 247 et seq. It appears that an agreement for the exchange of property or for some other transaction in which the consideration for the transfer does not consist primarily of money is not an agreement for the sale or purchase of property: see *Robshaw Bros Ltd v Mayer* [1957] Ch 125, [1956] 3 All ER 833; *Doyle v East* [1972] 2 All ER 1013, [1972] 1 WLR 1080.

3 In the case of sale or purchase, it does not matter that the value of the property may exceed the statutory limit if the purchase price is within it: *R v Judge Whitehorne* [1904] 1 KB 827, DC. As to purchase money on a contract for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 309 et seq.

4 In the case of a lease, it is the value of the freehold, and not the value of the leasehold interest, which governs jurisdiction: *Angel v Jay* [1911] 1 KB 666, DC.

5 County Courts Act 1984 s 23(d). 'The county court limit' means the limit for the time being specified by an order under the County Courts Act 1984 s 145: s 147(1). For this purpose the current limit is £30,000: County Courts Jurisdiction Order 1981, SI 1981/1123, art 2, Table (amended by SI 1991/724). As to the general equity jurisdiction of county courts see COURTS.

6 See the County Courts Act 1984 s 24 (as amended); and COURTS.

7 See *ibid* s 41 (amended by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 30; and by the Courts and Legal Services Act 1990 s 2(2)); and the County Courts Act 1984 s 42 (substituted by the Courts and Legal Services Act 1990 s 2(3)). See also CCR Ord 16 Pt III (rr 9-11); and see COURTS.

8 See the County Courts Act 1984 s 38(1) (substituted by the Courts and Legal Services Act 1990 s 3); and COURTS. See also *Bourne v McDonald* [1950] 2 KB 422, [1950] 2 All ER 183, CA. As to mandatory injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 376 et seq.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



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PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(i) Tribunals  
having Jurisdiction/908. Arbitrators.

### **908. Arbitrators.**

Where a written agreement contains a provision for submitting disputes as to the performance of a contract, other than a contract relating to land or any interest in land, to arbitration and does not express a contrary intention, the arbitrators or umpire have the same power as the High Court<sup>1</sup> to order specific performance of the contract<sup>2</sup>.

1 As to the court's power to order specific performance see PARA 832 ante.

2 See the Arbitration Act 1950 s 15.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **908 Arbitrators**

TEXT AND NOTES--1950 Act s 15 repealed: Arbitration Act 1996 Sch 4. As to the various remedies available in arbitral proceedings, including specific performance, see now 1996 Act s 48 (see ARBITRATION vol 2 (2008) PARA 1259).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(ii) Nature of  
 Proceedings/909. Form of proceedings.

## **(ii) Nature of Proceedings**

### **909. Form of proceedings.**

Proceedings in the High Court to obtain a judgment for specific performance are usually commenced in the Chancery Division, even if not expressly assigned to it<sup>1</sup>, as the machinery of the Chancery Division is better adapted to the complicated procedure which is often necessary for the carrying into effect of an order for specific performance<sup>2</sup>. Specific performance actions are almost always begun by writ<sup>3</sup>, since in relatively simple actions where the originating summons procedure might otherwise be appropriate the plaintiff will generally wish to apply for summary judgment<sup>4</sup>, and such an application can only be made if the proceedings have been begun by writ<sup>5</sup>.

1 As to the assignment of actions for specific performance to the Chancery Division or the Queen's Bench Division see PARA 906 ante. As to the jurisdiction of the county court see PARA 907 ante.

2 As to proceedings after judgment see PARA 963 et seq post.

3 As to the procedure for beginning an action by writ see CIVIL PROCEDURE.

4 Ie in most cases summary judgment pursuant to RSC Ord 86: see PARA 926 et seq post.

5 See RSC Ord 86 r 1(1).

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(ii) Nature of  
 Proceedings/910. Vendor and purchaser summonses.

### **910. Vendor and purchaser summonses.**

A vendor or purchaser of any interest in land or their representatives respectively may apply in a summary way to the court in respect of any requisitions<sup>1</sup> or objections or any claim for compensation or any other question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract<sup>2</sup>. Such an application is made by originating summonses and is known as a 'vendor and purchaser summons'<sup>3</sup>. This procedure can be used as a relatively cheap and quick alternative to a full specific performance action, particularly where a specific objection to title is raised and the parties accept that the contract must stand or fall by the validity of that objection<sup>4</sup>. The jurisdiction is not limited to issues of title but can be invoked to decide such matters as a question of construction of the contract, a dispute over the proper form of the conveyance or transfer, or a question as to the validity of a notice to rescind<sup>5</sup>. The jurisdiction can be exercised even if the validity or enforceability of the contract is not admitted<sup>6</sup>. However, a vendor and purchaser summons is not a suitable form of proceedings for deciding disputed issues of fact, and if such issues arise the court may order the action to proceed as if it had been begun by a writ claiming specific performance<sup>7</sup>. The court cannot make an order for specific performance or award damages on a vendor and purchaser summons, but if the court sustains an objection to title it may grant consequential relief, such as a declaration that the contract is rescinded and an order that the vendor return the deposit with interest and pay the purchaser's costs of investigating title<sup>8</sup>. The court cannot make an award of 'compensation' if the claim is in truth for damages over and above interest and the costs of investigating title<sup>9</sup>.

The county court has jurisdiction under the above provisions where the land which is to be dealt with in the court does not exceed £30,000 in capital value<sup>10</sup>.

1 As to requisitions on title see SALE OF LAND vol 42 (Reissue) PARA 163 et seq.

2 Law of Property Act 1925 s 49(1): see SALE OF LAND vol 42 (Reissue) PARA 220 et seq. The jurisdiction extends to contracts for exchange (s 49(3)), and has been exercised in relation to contracts for the grant of leases (*Re Anderton and Milner's Contract* (1890) 45 ChD 476 (lease at a premium); *Re Lander and Bagley's Contract* [1892] 3 Ch 41 (lease without a premium)). Cf, however, *Young v Markworth Properties Ltd* [1965] Ch 475, [1965] 1 All ER 834, Lands Tribunal, where the grant of a lease at a premium was held not to be a 'sale'.

3 As to vendor and purchaser summonses generally see SALE OF LAND vol 42 (Reissue) PARA 220 et seq.

4 See SALE OF LAND vol 42 (Reissue) PARA 221.

5 *Re Jackson and Woodburn's Contract* (1887) 37 ChD 44.

6 *Re Lander and Bagley's Contract* [1892] 3 Ch 41; *Re Hughes and Ashley's Contract* [1900] 2 Ch 595, CA.

7 RSC Ord 28 r 8; see *Re Hare and O' More's Contract* [1901] 1 Ch 93.

8 *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454, CA; *Re Higgins and Percival* (1888) 57 LJ Ch 807; *Re Walker and Oakshott's Contract* [1901] 2 Ch 383. See SALE OF LAND vol 42 (Reissue) PARA 222.

9 *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454, CA; *Re Wilson's and Stevens' Contract* [1894] 3 Ch 546.

10 Law of Property Act 1925 s 49(4) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt II para 2(1), (3); amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule).

**UPDATE**

**906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/911. Parties to the contract.

### **(iii) Parties**

#### **911. Parties to the contract.**

Usually, the parties to an action for specific performance will be the parties to the contract<sup>1</sup>. For this purpose, a contract entered into by an agent having actual, implied or ostensible authority to contract on behalf of his principal<sup>2</sup> or which is subsequently ratified by the principal<sup>3</sup> will be treated as having been made by the principal, and can generally be enforced directly by or against the principal<sup>4</sup>. Where there has been a novation of the contract<sup>5</sup> resulting from an agreement by all parties that a new person should be introduced as party to the contract in place of an original party who is discharged, the contract is enforceable against the new party to the contract and not against his predecessor<sup>6</sup>. A person purporting to act as agent for a third party but in fact acting on his own behalf may enforce the contract in his own name against the other party to the contract unless that other party has been prejudiced by the former's representation that he was acting as an agent<sup>7</sup>.

1 As to parties to contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 64 et seq; and as to parties to actions generally see CIVIL PROCEDURE vol 11 (2009) PARA 207 et seq.

2 As to the authority of an agent see AGENCY vol 1 (2008) PARA 29 et seq; and as to the liability of the principal see AGENCY vol 1 (2008) PARA 121 et seq.

3 As to ratification of an agent's acts see AGENCY vol 1 (2008) PARA 57 et seq.

4 As to the principal's liability for contracts entered into by the agent see AGENCY vol 1 (2008) PARA 125 et seq; and as to exceptions to a principal's liability see AGENCY vol 1 (2008) PARAS 127-131.

5 As to novation of contracts see CONTRACT vol 9(1) (Reissue) PARAS 1036-1042.

6 *Holden v Hayn and Bacon* (1815) 1 Mer 47; *Stanley v Chester and Birkenhead Rly Co* (1838) 9 Sim 264; *Shaw v Fisher* (1855) 5 De GM & G 596; *Coles v Bristowe* (1868) 4 Ch App 3; *Hawkins v Maltby* (1869) 4 Ch App 200.

7 *Fellowes v Lord Gwydyr and Page* (1829) 1 Russ & M 83; *Gewa Chartering BV v Remco Shipping Lines Ltd, The Remco* [1984] 2 Lloyd's Rep 205.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/912. Strangers to the contract.

## 912. Strangers to the contract.

As a general rule, the obligation to perform a contract cannot be assigned by the promisor to a third person except by novation with the consent of the promisee<sup>1</sup>. This means that the contract cannot be enforced against a stranger<sup>2</sup>. There are certain exceptions to this rule; in particular, contracts may in certain circumstances be enforced against a transferee of the subject matter of the contract<sup>3</sup>. By contrast, the benefit of a contract can be assigned and the assignee will normally be able to enforce the contract against a party who contracted with the assignor<sup>4</sup>. In the case of the death or bankruptcy of a contracting party, both the benefit and burden of a contract may pass by operation of law to the personal representatives<sup>5</sup> or trustee in bankruptcy<sup>6</sup>. Apart from cases of assignment or transfer of the benefit of a contract by operation of law, a stranger to the contract cannot normally enforce it<sup>7</sup>. As an exception to this rule, if a party enters into a contract as trustee for a third person, the third person may enforce the contract directly<sup>8</sup>. However, it is necessary to prove that the person entering into the contract intended to enter into it in a fiduciary capacity<sup>9</sup>. It is not enough to show that the terms of the contract conferred a benefit on the third person, since this fact does not by itself give rise to any implication that the promisee was acting in a fiduciary capacity<sup>10</sup>. In some cases it may be necessary or desirable to make a stranger to the contract a co-defendant together with a contracting party, for example if the stranger claims an interest in the purchase money<sup>11</sup> or if the stranger has been let into possession of the property by the vendor and the purchaser needs an order for possession against him<sup>12</sup>.

1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co Ltd* [1902] 2 KB 660 at 668, CA, per Collins MR; affd on other grounds [1903] AC 414, HL. As to the assignment of rights and liabilities see CONTRACT vol 9(1) (Reissue) PARAS 757-758; and as to novation of contracts see CONTRACT vol 9(1) (Reissue) PARAS 1036-1042.

2 'There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorise to be made on his behalf': *Howard v Miller* [1915] AC 318 at 323, PC, per Lord Parker. See also *Robertson v Great Western Rly Co* (1839) 1 Ry & Can Cas 459; *Hare v London and North Western Rly Co* (1860) 1 John & H 252.

3 See PARA 915 post.

4 *Crosbie v Tooke* (1833) 1 My & K 431; *Morgan v Rhodes* (1834) 1 My & K 435. See also PARA 914 post.

5 See PARA 913 post.

6 See PARA 918 post.

7 *Tweddle v Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL. See also CONTRACT vol 9(1) (Reissue) PARAS 748, 749.

8 *Touche v Metropolitan Railway Warehousing Co* (1871) 6 Ch App 671; *Kelly v Larkin* [1910] 2 IR 550. However, it is normally necessary for the beneficiary to sue the trustee as well as the other party to the contract, unless that other party waives this requirement: see *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL. See also CONTRACT vol 9(1) (Reissue) PARAS 760-761. A covenant in a marriage settlement will be enforced at the suit of a person within the marriage consideration: *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228 at 242, CA, per Cotton LJ.

9 As to intention to create a trust see CONTRACT vol 9(1) (Reissue) PARA 762.

10 *Re Schebsman, ex p Official Receiver, The Trustee v Cargo Superintendents (London) Ltd and Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

11 *West Midland Rly Co v Nixon* (1863) 1 Hem & M 176.

12 *Bishop of Winchester v Mid-Hants Rly Co* (1867) LR 5 Eq 17.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/913. Death of party to the contract.

### **913. Death of party to the contract.**

If a party to a contract dies before performance is completed, an order for specific performance can normally be obtained by or against the personal representatives of the deceased, but only if such an order could have been obtained by or against the deceased<sup>1</sup>. Consequently, specific performance will not be ordered of a contract requiring the exercise by the deceased of some personal skill or discretion<sup>2</sup>. If the deceased has entered into a contract to take a lease, his personal representatives are entitled to have the lease so framed that they incur no personal liability under the covenants<sup>3</sup>.

<sup>1</sup> See *Hinton v Hinton* (1755) 2 Ves Sen 631; *Phillips v Everard* (1831) 5 Sim 102. As to proceedings against estates generally see CIVIL PROCEDURE. As to the effect of the death of a party on a contract for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 202 et seq; and as to actions by and against personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 808 et seq.

<sup>2</sup> See *Siboni v Kirkman* (1836) 1 M & W 418 at 423 per Parke B; affd sub nom *Kirkman v Siboni* (1838) 4 M & W 339, Ex Ch; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 762. Cf *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA. As to the enforceability of contracts for personal services see PARAS 807-808 ante.

<sup>3</sup> *Stephens v Hotham* (1855) 1 K & J 571. The liability of the personal representatives is limited to the assets of the estate, and they do not incur the unrestricted liability to which they would otherwise have been subject as the original grantees of the lease: *Stephens v Hotham* supra. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 39.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/914. Enforcement by assignee of the contract.

#### **914. Enforcement by assignee of the contract.**

Where the benefit of a contract has been assigned, the assignee may as a general rule enforce specific performance provided that the assignee can himself perform or procure the performance of the assignor's obligations under the contract<sup>1</sup>. On the assignment of a contract to take a lease, the lessor can require the assignor to join in the lease for the purpose of guaranteeing performance of the lessee's covenants<sup>2</sup>. On a sale of leaseholds, if the contract is not entered into on grounds personal to the purchaser, completion may be enforced in favour of a solvent nominee of the purchaser, but upon the terms that the purchaser joins in the assignment for the purpose of guaranteeing the performance of the covenants in the lease<sup>3</sup>. Where, however, there is a personal element in the contract<sup>4</sup>, or where there is an express proviso against assignment<sup>5</sup>, or the assignment is illegal or contrary to public policy<sup>6</sup>, the assignee cannot enforce specific performance.

As a rule, it is not necessary for the assignee to join the assignor as a party to an action for specific performance brought against the other party to the contract<sup>7</sup>. There are, however, many circumstances in which it may be necessary or desirable to join the assignor as a party to the action. If there has been an equitable assignment of a legal chose in action, any claim to the chose in action must be brought in the name of the assignor<sup>8</sup>; and if the assignor refuses to consent to the use of his name, the assignee sues in his own name and must make the assignor a defendant to the action<sup>9</sup>. The assignor should be joined if it is necessary to ensure that he is bound by the decision or if he is required to perform any obligations under the original contract or the assignment.

A person who has taken an assignment of the benefit of a contract by way of charge or mortgage is entitled to claim specific performance of the contract<sup>10</sup>.

The rights of a sub-purchaser to enforce a contract against the original vendor are substantially the same as those of an assignee of the benefit of a contract<sup>11</sup>.

If a contract between the vendor and the original purchaser can be treated as severable into a series of independent contracts, an assignee or sub-purchaser of a severable part of the original contract can require completion of that part without having to procure completion of the original contract in its entirety<sup>12</sup>.

1 *Crosbie v Tooke* (1833) 1 My & K 431; *Morgan v Rhodes* (1834) 1 My & K 435. See also CONTRACT vol 9(1) (Reissue) PARA 757. For a form of statement of claim by an assignee from a purchaser to enforce a contract for the sale of goods see Court Forms.

2 *Dowell v Dew* (1842) 1 Y & C Ch Cas 345.

3 *Curtis Moffat Ltd v Wheeler* [1929] 2 Ch 224. How far the solvency or other personal quality of the intended lessee is relied on by the lessor in the ordinary cases of leases is a question of fact, but that such contracts are assignable appears clearly from *Dowell v Dew* (1843) 12 LJ Ch 158 at 164 per Lord Lyndhurst LC; *Buckland v Papillon* (1866) 2 Ch App 67 at 71 per Lord Chelmsford LC.

4 *Gibson v Carruthers* (1841) 8 M & W 321 at 343; *Rayner v Grote* (1846) 15 M & W 359 at 365; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co Ltd* [1901] 2 KB 811 at 816 (revsd on another point [1902] 2 KB 660, CA; [1903] AC 414, HL); *Barnes v Wilson* (1913) 29 TLR 639. See also CHOSSES IN ACTION vol 13 (2009) PARA 99; CONTRACT vol 9(1) (Reissue) PARA 757.

- 5 *Weatherall v Geering* (1806) 12 Ves 504. Cf *Jalabert v Duke of Chandos* (1759) 1 Eden 372. See also *Dowell v Dew* (1842) 1 Y & C Ch Cas 345.
- 6 *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914.
- 7 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd, Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co Ltd* [1903] AC 414 at 424-425, HL, per Lord Lindley.
- 8 *Durham Bros v Robertson* [1898] 1 QB 765, CA. See also CHOSSES IN ACTION vol 13 (2009) PARA 68.
- 9 *Hammond v Messenger* (1838) 9 Sim 327; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 380 per Blackburn J. See CHOSSES IN ACTION vol 13 (2009) PARA 68.
- 10 *Browne v London Necropolis and National Mausoleum Co* (1857) 6 WR 188; *Shaw v Foster* (1872) LR 5 HL 321. See also SALE OF LAND vol 42 (Reissue) PARA 201.
- 11 *Shaw v Foster* (1872) LR 5 HL 321 at 338-339 per Lord Cairns.
- 12 *Wilkinson v Clements* (1872) 8 Ch App 96.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/915. Enforcement against transferee of property.

### **915. Enforcement against transferee of property.**

Where there is a contract for the sale or demise of property and the property is thereafter transferred to a third person, the general principle is that specific performance may be granted against the transferee, if he is a volunteer, or takes with notice of the prior contract, or has acquired only an equitable title and has no better equity than the purchaser or intended lessee<sup>1</sup>. The relevant time for notice is the time of completion of the transfer, and it is no defence to the transferee that he had no notice of the plaintiff's contract at the time when he entered into his own contract<sup>2</sup>. If the subject matter of the contract is a legal estate in land, the above principle takes effect subject to important modifications<sup>3</sup>.

If the vendor sells the subject matter of the contract to a company controlled by him, both he and the company may be ordered to perform the contract<sup>4</sup>.

1 *Taylor v Stibbert* (1794) 2 Ves 437. The principle applies to contracts for the sale of shares: *Graham v O' Connor* (1895) 73 LT 712. See also EQUITY vol 16(2) (Reissue) PARA 565 et seq. For a form of statement of claim by a purchaser claiming specific performance against a transferee from the vendor see Court Forms. Cf *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] AC 511, [1985] 1 All ER 120, PC.

2 *Mumford v Stohwasser* (1874) LR 18 Eq 556.

3 The modifications contained in the Land Charges Act 1972 (in relation to land with unregistered title), and the Land Registration Act 1925 (in relation to land with registered title): see PARA 916 post. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990: see the Registration of Title Order 1989, SI 1989/1347; and LAND REGISTRATION.

4 *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **915 Enforcement against transferee of property**

NOTE 3--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii)  
Parties/916. Contracts relating to land.

## **916. Contracts relating to land.**

An uncompleted contract for the purchase of a legal estate in unregistered land will be void and unenforceable against a subsequent purchaser for money or money's worth of a legal estate in the land, unless registered in the register of land charges kept under the Land Charges Act 1972 before completion of the subsequent purchase<sup>1</sup>. Conversely, registration of a contract in the register of land charges is deemed to constitute actual notice to all persons and for all purposes connected with the land affected<sup>2</sup>.

The Land Charges Act 1972 does not apply to estate contracts affecting land registered under the Land Registration Act 1925<sup>3</sup>. In the case of registered land, an estate contract may be protected by entry of a notice on the register of title<sup>4</sup> or by lodging with the registrar a caution against dealings<sup>5</sup>. If an estate contract has been protected by entry of a notice, any subsequent disposition of the land by the vendor takes effect subject to the contract<sup>6</sup>. A caution does not in itself constitute notice of the contract<sup>7</sup>, but it protects the contract by preventing the subsequent purchaser from obtaining registration of the transfer to him and thereby defeating the cautioner's estate contract<sup>8</sup>. The rights of a purchaser who is in actual occupation of registered land or in receipt of its rents and profits constitute an overriding interest to which the registered land remains subject, unless inquiry has been made of him and the rights have not been disclosed<sup>9</sup>; hence (except in case of non-disclosure on inquiry) an option in a lease enabling the sitting tenant to purchase the reversion will be enforceable against a purchaser from the lessor as an overriding interest despite the fact that it has not been protected by notice or caution<sup>10</sup>.

Where an action is instituted for the specific performance of a contract relating to registered land or a registered charge, the court may cause all or any parties who have registered interests or rights in the registered land or charge or have entered up notices, cautions, restrictions or inhibitions against it to appear in the action and show cause why the contract should not be specifically performed<sup>11</sup>. The court may direct that any order made in the action is to be binding on such parties or any of them<sup>12</sup>.

1 See the Law of Property Act 1925 s 199(1)(i); the Land Charges Act 1972 ss 2(4)(iv), 4(6) (s 4(6) amended by the Finance Act 1975 s 52(1), Sch 12 paras 2, 18(1), (5); and by the Capital Transfer Tax Act 1984 s 276, Sch 8 para 3(2)); and LAND CHARGES vol 26 (2004 Reissue) PARA 643. The first contract will be void even if the sale to the subsequent purchaser was for nominal consideration and was effected for the purpose of defeating the earlier contract: *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL. Where an option to purchase is registered as an estate contract under the Land Charges Act 1972 s 2(4)(iv), the contract for the sale of land resulting from the exercise of the option need not be so registered to preserve priority: *Armstrong & Holmes Ltd v Holmes* [1994] 1 All ER 826, [1993] 1 WLR 1482. An unregistered contract may become binding on a subsequent purchaser through the principle of equitable estoppel if the subsequent purchaser stands by while the original contracting party spends money or otherwise acts to his detriment in the belief that the contract is effective: *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, [1981] 1 All ER 897. See PARA 805 ante.

2 See the Law of Property Act 1925 s 198(1) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1); and LAND CHARGES vol 26 (2004 Reissue) PARA 616. Such registration does not, however, exclude a vendor's liability in respect of certain covenants as to title implied by statute: see the Law of Property (Miscellaneous Provisions) Act 1994 s 6(3); and REAL PROPERTY; SALE OF LAND.

3 See the Land Charges Act 1972 s 14(1); and LAND CHARGES vol 26 (2004 Reissue) PARA 605. See also the Land Registration Act 1925 s 59(2); and LAND REGISTRATION. The system of compulsory registration of title on sale

of land now extends to the whole of England and Wales with effect from 1 December 1990: see the Registration of Title Order 1989, SI 1989/1347; and LAND REGISTRATION.

4 See the Land Registration Act 1925 s 49(1)(c); and LAND REGISTRATION.

5 See *ibid* s 54(1) (amended by the Land Registration Act 1986 s 5(5)(a)); and LAND REGISTRATION.

6 See the Land Registration Act 1925 s 52(1); and LAND REGISTRATION. As to the effect of s 52(1) see *Mortgage Corp'n Ltd v Nationwide Credit Corp'n Ltd* [1994] Ch 49, [1993] 4 All ER 623, CA.

7 See the Land Registration Act 1925 s 56(2); and LAND REGISTRATION; *Barclays Bank Ltd v Taylor* [1974] Ch 137 at 147, [1973] 1 All ER 752 at 757, CA, per Russell LJ.

8 See the Land Registration Act 1925 ss 20(1), 23(1) (amended by the Finance Act 1975 s 52(1), Sch 12 paras 2, 5(1)-(3)); and LAND REGISTRATION.

9 See the Land Registration Act 1925 s 70(1)(g); LAND REGISTRATION; and *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL; *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL.

10 *Webb v Pollmount Ltd* [1966] Ch 584, [1966] 1 All ER 481. See also *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766.

11 Land Registration Act 1925 s 139(1): see LAND REGISTRATION.

12 *Ibid* s 139(1). All costs incurred by any parties appearing pursuant to an order under s 139(1) in an action to enforce against a vendor specific performance of his contract are taxed as between solicitor and client (see CIVIL PROCEDURE) and, unless the court otherwise orders, must be paid by the vendor: s 139(2); and see RSC Ord 62 r 28(4).

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 916 Contracts relating to land

TEXT AND NOTES--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/917. Contracts made by company promoters.

**917. Contracts made by company promoters.**

Where a contract purports to be made by or on behalf of a company, at a time when the company has not been formed, then, subject to any agreement to the contrary, the contract is to have effect as a contract entered into by the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly<sup>1</sup>. A pre-incorporation contract cannot be enforced against the company, as a contract can only be ratified by a principal if the principal was in existence at the date of the contract<sup>2</sup>.

<sup>1</sup> Companies Act 1985 s 36C(1) (added by the Companies Act 1989 s 130(4)). See further COMPANIES vol 14 (2009) PARA 66.

<sup>2</sup> See AGENCY vol 1 (2008) PARA 61; and COMPANIES.

**UPDATE**

**906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/918. Bankruptcy of contracting party.

### **918. Bankruptcy of contracting party.**

Bankruptcy does not, as a general rule, determine a contract<sup>1</sup>. Property held by the bankrupt on trust for any other person does not vest in his trustee in bankruptcy<sup>2</sup>. There is therefore no barrier to specific performance being ordered for or against a bankrupt in respect of property held by him on trust for others.

When an individual is adjudicated bankrupt his estate<sup>3</sup> vests automatically in his trustee in bankruptcy immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee<sup>4</sup>, and all rights of the bankrupt under contracts to which he was a party are deemed to have been assigned to the trustee<sup>5</sup>.

A trustee in bankruptcy is entitled to specific performance of a contract for the sale or purchase of property entered into by the bankrupt before the commencement of the bankruptcy if the contract is of a kind which the bankrupt would have been able to enforce and the performance of it does not require the exercise of any skill or discretion which is personal to the bankrupt<sup>6</sup>. Specific performance of a contract by the bankrupt to purchase property will not, however, normally be granted against the trustee<sup>7</sup>. A trustee in bankruptcy who seeks specific performance of a contract for the grant of a lease to the bankrupt may be required personally to enter into the lessee's covenants in the lease as a condition of obtaining the order<sup>8</sup>.

A trustee in bankruptcy is normally entitled to disclaim an unprofitable contract entered into by the bankrupt, and if he does so the contract can no longer be enforced against the trustee and the other party is left to submit a proof in the bankruptcy for any damage suffered<sup>9</sup>. The trustee in bankruptcy of a vendor cannot disclaim the contract if the equitable interest in the property has already passed to the purchaser, and in such a case the trustee can be ordered to complete the sale upon receipt of the purchase price<sup>10</sup>.

A trustee will be deemed to have adopted an unprofitable contract if a written application has been made to him to decide whether he will disclaim or not and the period of 28 days beginning with the day on which that application was made has expired without a notice of disclaimer having been given in respect of that property<sup>11</sup>.

The trustee in bankruptcy will, of course, often enter into contracts for the sale of property of the bankrupt in the course of realising his assets, in which case the trustee himself is the contracting party and any action to enforce the contract by or against the trustee is governed by the general principles of the law of specific performance.

Property which is acquired by, or devolves upon, the bankrupt after the commencement of the bankruptcy does not automatically vest in the trustee. The trustee may, however, by notice in writing claim for the bankrupt's estate any property which has been so acquired by, or has so devolved upon, the bankrupt<sup>12</sup>. Except with the leave of the court, such a notice cannot be served after the end of the period of 42 days beginning with the day on which it first came to the knowledge of the trustee that the property in question had been acquired by, or had devolved upon, the bankrupt<sup>13</sup>. Upon service of the notice, the property to which it relates vests in the trustee as part of the bankrupt's estate and his title relates back to the time at which the property was acquired by, or devolved upon, the bankrupt<sup>14</sup>. Notice cannot, however, be given to a person in respect of property which he has acquired in good faith, for value and without notice of the bankruptcy<sup>15</sup>.

1 *Brooke v Hewitt* (1796) 3 Ves 253 at 255; *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 at 293-294; *Re Sneezum, ex p Davis* (1876) 3 ChD 463 at 473, CA; *Jennings' Trustee v King* [1952] Ch 899 at 908, [1952] 2 All ER 608 at 612. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 418.

2 See the Insolvency Act 1986 s 283(3)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 428 et seq.

3 As to the meaning of a bankrupt's 'estate' see *ibid* s 283 (amended by the Housing Act 1988 s 117(1)); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216.

4 Insolvency Act 1986 s 306(1); Land Registration Act 1925 s 61(5).

5 Insolvency Act 1986 s 311(4); see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 398.

6 See *Brooke v Hewitt* (1796) 3 Ves 253; *Powell v Lloyd* (1828) 2 Y & J 372; *Crosbie v Tooke* (1833) 1 My & K 431; *Morgan v Rhodes* (1834) 1 My & K 435; *Buckland v Papillon* (1866) 2 Ch App 67. Where the contract requires personal skill the trustee in bankruptcy cannot obtain an order for specific performance by offering to perform the bankrupt's obligations himself: *Knight v Burgess* (1864) 33 LJ Ch 727 (building contract); *Gibson v Carruthers* (1841) 8 M & W 321 at 343 per Lord Abinger CB. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 418.

7 *Holloway v York* (1877) 25 WR 627. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 419.

8 See *Powell v Lloyd* (1828) 2 Y & J 372; *Crosbie v Tooke* (1833) 1 My & K 431.

9 See the Insolvency Act 1986 s 315 (amended by the Housing Act 1988 s 117(4)); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 418, 472 et seq. The Insolvency Act 1986 s 315 (as so amended) does not, however, apply in relation to a market contract or a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to market contracts: Companies Act 1989 s 164(1). For the meaning of 'market contract' see s 155 (amended by the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 3); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 510.

10 *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722; *Re Bastable, ex p Trustee* [1901] 2 KB 518, CA; *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122; and see *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199 at 207-208, [1984] 1 All ER 495 at 501. If the purchaser has paid the purchase money to the bankrupt without notice of the act of bankruptcy, he cannot obtain an order directing the assignment of the property to him without paying the purchase money over again to the trustee: *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367, CA. However, the trustee cannot be ordered to perform any work on the land which the bankrupt agreed to carry out as part of the contract: *Re Gough, Hanning v Lowe* (1927) 96 LJ Ch 239, DC.

11 See the Insolvency Act 1986 s 316; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 480.

12 *Ibid* s 307(1). See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 445-448.

13 *Ibid* s 309(1)(a).

14 *Ibid* s 307(3). See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 446.

15 *Ibid* s 307(4). See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 446.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 918 Bankruptcy of contracting party

NOTE 4--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.



NOTE 9--Companies Act 1989 s 164(1) amended: see FINANCIAL SERVICES AND INSTITUTIONS  
vol 48 (2008) PARA 518.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/919. Company insolvency.

### **919. Company insolvency.**

Although the functions of a liquidator<sup>1</sup> in the winding up of a company resemble those of a trustee in bankruptcy<sup>2</sup>, there are important differences. In particular, the property of the company does not vest in the liquidator, but remains vested in the company. A liquidator has power to disclaim any onerous property<sup>3</sup>, and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it<sup>4</sup>. The company will be deemed to have adopted an unprofitable contract if a written application has been made to the liquidator by any person interested in the contract requiring him to decide whether he will or will not disclaim and the liquidator has not, within a 28-day period after receipt of the application or such further period as the court may allow, given the prescribed notice<sup>5</sup>. In a winding up by the court, any disposition of the property of the company made after the commencement of the winding up<sup>6</sup> is void unless the court orders otherwise<sup>7</sup>. The court will normally direct completion of a contract of sale by the company entered into in good faith in the ordinary course of business if an equitable title has passed to the purchaser between the presentation of the petition and the making of the winding-up order, but if title has not passed the purchaser will be left to prove for damages in the liquidation<sup>8</sup>.

In a winding up by the court, the court has power to stay proceedings against the company before the winding-up order<sup>9</sup>, and after the order has been made no action may be begun or proceeded with against the company without the leave of the court<sup>10</sup>. In an action for specific performance a stay will normally be refused, or leave to proceed given, if the action relates to a contract for sale under which equitable title has passed from the company to the purchaser<sup>11</sup> or if there is an arguable defence to the action and it is more convenient to resolve the issues in the action than in proceedings in the liquidation<sup>12</sup>.

The commencement of the liquidation or the making of a winding-up order does not affect the powers of a receiver appointed under a debenture to deal with the property charged by the debenture, so a contract relating to such property entered into by the receiver in the name of the company can be specifically enforced notwithstanding the making of a winding-up order<sup>13</sup>.

Where a company enters into a contract to sell land, the fact that it is placed in receivership prior to completion is not of itself a defence to a claim by the purchaser for specific performance<sup>14</sup>.

1 As to the appointment and duties of a liquidator see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 950.

2 As to the position of a trustee in bankruptcy see PARA 918 ante.

3 'Onerous property' comprises any unprofitable contract and any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act: Insolvency Act 1986 s 178(3).

4 Ibid s 178(2). See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq. Section 178 does not, however, apply in relation to a market contract or a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to market contracts: Companies Act 1989 s 164(1). For the meaning of 'market contract' see s 155 (amended by the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 3); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 510. It seems that, by analogy with the cases cited in PARA 918 note 10 ante, a liquidator cannot disclaim a contract for a sale by the company under which an equitable interest in the property has passed to the purchaser before the commencement of the winding up.

5 Insolvency Act 1986 s 178(5); Insolvency Rules 1986, SI 1986/1925, rr 4.187-4.194; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 872. As to the disclaimer of leaseholds see the Insolvency Act 1986 s 179; and as to the right of the other party to the company's contract to apply to the court for an order rescinding the contract see s 186. See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 186.

6 As to the time of the commencement of the winding up see *ibid* s 129; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 489.

7 See *ibid* s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 700. Section 127 does not affect the liquidator's powers to dispose of the property of the company, which in the case of a winding up by the court are conferred by s 167: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 578. Nor does s 127 apply to (1) a market contract, or any disposition of property in pursuance of such a contract; (2) the provision of margin in relation to market contracts; (3) a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to a market contract, or any disposition of property in pursuance of such a contract; or (4) any disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin: Companies Act 1989 s 164(3). See further s 164(4)-(6); and COMPANIES vol 15 (2009) PARA 1237; FINANCIAL SERVICES AND INSTITUTIONS.

8 *Re Wiltshire Iron Co, ex p Pearson* (1868) 3 Ch App 443; *Re Oriental Bank Corpn, ex p Guillemin* (1884) 28 ChD 634. A fortiori, completion will be ordered if equitable title passed to the purchaser before the commencement of the winding up: cf the bankruptcy cases cited in PARA 918 note 10 ante. See *Re French's (Wine Bar) Ltd* [1987] BCLC 499.

9 See the Insolvency Act 1986 s 126; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 887.

10 See *ibid* s 130(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 490; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 893.

11 See *Marshall v Glamorgan Iron and Coal Co* (1868) LR 7 Eq 129.

12 *Thames Plate Glass Co v Land and Sea Telegraph Construction Co* (1871) 6 Ch App 643. See also *Re Coregrange* [1984] BCLC 453 (action to enforce specific performance against company in liquidation permitted).

13 *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615.

14 *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 919 Company insolvency

NOTE 4--Companies Act 1989 s 164(1) amended: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 518.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iii) Parties/920. Incapacity.

## **920. Incapacity.**

A contract is not rendered void or voidable if a party becomes mentally incapable between contract and completion, and specific performance will be ordered in such circumstances if it would have been ordered for or against a person not under disability<sup>1</sup>, unless the contract involves the exercise by the incapacitated party of some personal skill or discretion. A contract entered into by a person who is mentally incapable but is not at that time a patient under the jurisdiction of the Court of Protection<sup>2</sup> will be likewise binding and enforceable if the other party was not aware of the incapacity<sup>3</sup>. Even where the incapacity was known to the other party, the contract is only voidable and can subsequently be adopted by the Court of Protection<sup>4</sup>. While, however, the Court of Protection has jurisdiction over the property of a patient, any contract entered into by the patient personally is wholly void<sup>5</sup>. A receiver appointed under the mental health legislation may enter into a contract for the disposition or acquisition of property on behalf of the patient if so directed or authorised by the Court of Protection or by a judge<sup>6</sup>. The receiver acts as statutory agent for the patient and is not personally liable on any contract made by him on behalf of the plaintiff<sup>7</sup>, so any proceedings for specific performance of such a contract must be brought or defended in the name of the patient.

As with the other types of litigation, a person who is incapable by reason of mental disorder of managing and administering his property and affairs can only bring an action for specific performance by his next friend and can only defend such proceedings by a guardian ad litem<sup>8</sup>.

The enforcement of a specific performance order against a patient presents difficulties, since carrying out an order is not part of the functions of a guardian ad litem and the court trying the action has no power to make an order directly binding on the receiver<sup>9</sup>. The receiver may apply to the Court of Protection for an order that the contract be performed<sup>10</sup>, but the Court of Protection is not bound to make such an order if performance of the contract would prejudice the court's duty to secure that the patient is adequately maintained out of his estate<sup>11</sup>. However, in a purchaser's action for specific performance against a vendor patient, the plaintiff can obtain title by paying the purchase price in accordance with directions given by the court (whereupon the vendor becomes a bare trustee for the purchaser) and then applying for a vesting order in exercise of the court's powers to replace incapacitated trustees<sup>12</sup>.

Specific performance of contracts made by minors is dealt with elsewhere in this title<sup>13</sup>.

<sup>1</sup> *Owen v Davies* (1748) 1 Ves Sen 82; *Hall v Warren* (1804) 9 Ves 605. See MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

<sup>2</sup> For the meaning of 'patient' see MENTAL HEALTH vol 30(2) (Reissue) PARA 435; and as to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 676 et seq.

<sup>3</sup> *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA; *York Glass Co Ltd v Jubb* (1925) 134 LT 36, CA; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See MENTAL HEALTH vol 30(2) (Reissue) PARAS 600-602.

<sup>4</sup> *Baldwyn v Smith* [1900] 1 Ch 588.

<sup>5</sup> *Re Walker* [1905] 1 Ch 160, CA; *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284. See MENTAL HEALTH vol 30(2) (Reissue) PARA 605.

<sup>6</sup> Mental Health Act 1983 ss 96(1)(h), 99(1): see MENTAL HEALTH vol 30(2) (Reissue) PARAS 683, 682, 704, 706.

<sup>7</sup> *Re E G* [1914] 1 Ch 927, CA.

8 See RSC Ord 80 r 2; and CCR Ord 10 r 1. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 632 et seq.

9 *Ames v Parkinson* (1847) 2 Ph 388.

10 See the Mental Health Act 1983 ss 96(1)(h), 99(1).

11 See *Re Plenderleith* [1893] 3 Ch 332, CA, and *Re Winkle* [1894] 2 Ch 519, CA (execution by judgment creditors). See also MENTAL HEALTH vol 30(2) (Reissue) PARAS 682, 704.

12 See RSC Ord 80 r 12; CCR Ord 10 r 11. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

13 See PARA 809 text and note 4 ante.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iv) Pleading/921. Additional and alternative relief.

## **(iv) Pleading**

### **921. Additional and alternative relief.**

In addition to specific performance, the writ and statement of claim should claim any additional or alternative relief which the plaintiff may wish to seek in the action<sup>1</sup>. Such relief may include one or more of the following:

- 21 (1) damages in lieu of or in addition to specific performance<sup>2</sup>;
- 22 (2) rescission of the contract<sup>3</sup>;
- 23 (3) in a purchaser's action, return of the deposit and a declaration that the purchaser is entitled to a lien for its repayment<sup>4</sup>;
- 24 (4) in a vendor's action, a declaration that the deposit has been forfeited or that the plaintiff is entitled to a lien for the balance of the purchase money<sup>5</sup>;
- 25 (5) an injunction to restrain the defendant from dealing with the subject matter of the contract in a manner inconsistent with his obligations under it<sup>6</sup>;
- 26 (6) rectification<sup>7</sup>;
- 27 (7) an order for accounts and inquiries<sup>8</sup>;
- 28 (8) a vesting order<sup>9</sup>.

Where the plaintiff obtains judgment on motion for judgment in default of defence<sup>10</sup>, no relief can be obtained unless it has been claimed in the writ and statement of claim<sup>11</sup>.

<sup>1</sup> Costs need not be specifically claimed: RSC Ord 18 r 15(1). For forms of writ and statement of claim see Court Forms.

<sup>2</sup> As to damages see PARAS 955, 962 post.

<sup>3</sup> As to rescission see PARA 922 post.

<sup>4</sup> As to actions for the return of a deposit see SALE OF LAND vol 42 (Reissue) PARAS 245-246.

<sup>5</sup> As to actions for forfeiture of a deposit see SALE OF LAND vol 42 (Reissue) PARAS 234-238.

<sup>6</sup> As to injunctions in aid of specific performance see CIVIL PROCEDURE vol 11 (2009) PARA 469.

<sup>7</sup> As to rectification of contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARAS 354-355.

<sup>8</sup> As to accounts and inquiries see PARA 964 post.

<sup>9</sup> As to vesting orders see TRUSTS vol 48 (2007 Reissue) PARA 869 et seq.

<sup>10</sup> As to default judgments see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq.

<sup>11</sup> *Stone v Smith* (1887) 35 ChD 188; *Kingdon v Kirk* (1887) 37 ChD 141; *Tacon v National Standard Land Mortgage and Investment Co* (1887) 56 LJ Ch 529; *Palmer v Lark* [1945] Ch 182, [1954] 1 All ER 355.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iv)  
 Pleading/922. Rescission and repudiation.

## **922. Rescission and repudiation.**

The word 'rescission' is used in two different senses. In the strict sense, it means the exercise by a party to a contract of a right to have the contract avoided ab initio. Such a right may arise by virtue of a term in the contract itself or for some reason such as fraud, misrepresentation or mistake<sup>1</sup>. A person who has a right to rescind the contract in the strict sense will lose that right if, at a time when he knows that he has the right of rescission, he affirms the contract by taking some step which indicates an intention to proceed with it<sup>2</sup>. The commencement of an action claiming specific performance of a contract clearly affirms the contract<sup>3</sup>, so that rescission in the strict sense cannot in practice be claimed as alternative relief in an action for specific performance.

'Rescission' is, however, frequently and confusingly used in a broader sense to describe a different act, namely, the acceptance by one party to a contract of a repudiatory breach of contract by the other party<sup>4</sup>. Acceptance of repudiation discharges both parties from further performance of their executory obligations under the contract, but the contract is not avoided ab initio and the innocent party may claim damages for breach of contract<sup>5</sup>. A plaintiff may claim both specific performance and rescission (in the sense of acceptance of repudiation) in the alternative, but as these claims are inconsistent with each other he must elect between them at the trial if he has not done so previously<sup>6</sup>.

A person pursuing a claim for specific performance is treating the contract as still in existence, and therefore cannot elect to rescind after the defendant has remedied his breach and is able and willing to perform his part of the contract<sup>7</sup>. If the repudiatory breach is not of a continuing nature, the innocent party will be treated as having affirmed the contract and lost the right to rescind if, after acquiring full knowledge of the breach, he takes steps which indicate an intention to proceed with the contract<sup>8</sup> or delays in exercising the right to terminate it<sup>9</sup>.

It has been held that, where a plaintiff commenced an action for specific performance claiming damages as alternative relief but not rescission, he could not terminate the contract by accepting the repudiation without first discontinuing the action<sup>10</sup>.

1 As to rescission see PARA 894 et seq ante; and as to actions for rescission see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

2 As to affirmation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 829.

3 *Re Murray, Dickson v Murray* (1887) 57 LT 223.

4 As to 'rescission' in this sense see CONTRACT vol 9(1) (Reissue) PARA 989 et seq.

5 *Heyman v Darwins Ltd* [1942] AC 356 at 399, [1942] 1 All ER 337 at 360, HL, per Lord Porter; *Johnson v Agnew* [1980] AC 367 at 393, [1979] 1 All ER 883 at 889, HL, per Lord Wilberforce.

6 *Farrant v Oliver* (1922) 91 LJ Ch 758; *Glover v Broome* [1926] WN 46; *Johnson v Agnew* [1980] AC 367 at 392, [1979] 1 All ER 883 at 889, HL, per Lord Wilberforce. As to the right to terminate the contract and claim damages if the defendant fails to comply with an order for specific performance see PARA 966 post.

7 *Frost v Knight* (1872) LR 7 Exch 111 at 112, Ex Ch, per Cockburn CJ; *Halkett v Earl of Dudley* [1907] 1 Ch 590.

8 *Hain S S Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA.



9 *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 597 per Parker J, approved in *Berners v Fleming* [1925] Ch 264, CA.

10 *Public Trustee v Pearlberg* [1940] 2 KB 1, [1940] 2 All ER 270, CA, not followed in *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 (Aust HC). Cf *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iv) Pleading/923. Statement of claim.

### **923. Statement of claim.**

The normal rules of pleading<sup>1</sup> apply to specific performance actions. It is customary but not essential for the plaintiff to plead that he is ready, willing and able to perform his part of the contract<sup>2</sup>. If the plaintiff wishes to claim interest under a provision in the contract he should plead it<sup>3</sup>.

1 As to pleading generally see RSC Ord 18.

2 See RSC Ord 18 r 7(4); *Public Trustee v Pearlberg* [1940] 2 KB 1 at 11, [1940] 2 All ER 270 at 275, CA, per Slesser LJ. Cf *Ellis v Rogers* (1884) 29 ChD 661.

3 See RSC Ord 18 r 8(4); *Palmer v Lark* [1945] Ch 182, [1945] 1 All ER 355; and see also *Ward v Chief Constable for Avon and Somerset* (1985) 129 Sol Jo 606, CA.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iv)  
 Pleading/924. Pleadings concerning title to land.

#### **924. Pleadings concerning title to land.**

Unless the purchaser has accepted the vendor's title, an inquiry as to title will be directed as part of the order for specific performance of a contract for the sale of land<sup>1</sup>. In a vendor's action for specific performance it is therefore unnecessary for the plaintiff to plead or prove at the trial that he has a good title to the land<sup>2</sup>, and it is unnecessary for the defendant to plead any defect in the title or put the plaintiff to proof of title<sup>3</sup>. However, if the purchaser has accepted the vendor's title<sup>4</sup> the vendor should plead that fact in order to obviate the need for an inquiry as to title. If the vendor claims that the purchaser has waived an objection to title the vendor must plead the waiver<sup>5</sup> and prove it at the trial; the issue of waiver cannot be raised at the inquiry as to title<sup>6</sup>. A purchaser who has admitted the vendor's title in his pleadings is held to have waived any objection to title and is not entitled to an inquiry as to title<sup>7</sup>. A purchaser may plead a defect in the vendor's title with a view to having the vendor's claim dismissed at the trial without having to wait for the subsequent inquiry<sup>8</sup>. If a serious and irremediable defect in the vendor's title is disclosed at the trial, his claim for specific performance will be dismissed even though the defect was not pleaded by the purchaser<sup>9</sup>. Compensation may be granted for a defect appearing on an investigation of title, even though no claim to compensation was made in the pleadings and no order for compensation was made at the trial<sup>10</sup>.

1 *Jenkins v Hiles* (1802) 6 Ves 646; *Lesturgeon v Martin* (1834) 3 My & K 255. As to inquiries as to title see PARA 934 et seq post. As to specific performance of contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 247 et seq.

2 As to what constitutes a good title see SALE OF LAND vol 42 (Reissue) PARA 137. As to the covenants for title implied by statute on the disposition of a property see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and REAL PROPERTY; SALE OF LAND.

3 As to proof of title see SALE OF LAND vol 42 (Reissue) PARA 150 et seq.

4 As to acceptance of title see SALE OF LAND vol 42 (Reissue) PARAS 174-176.

5 *Clive v Beaumont* (1848) 1 De G & Sm 397; *Gaston v Frankum* (1848) 2 De G & Sm 561.

6 *McGrory v Alderdale Estate Co Ltd* [1918] AC 503, HL.

7 *Phipps v Child* (1857) 3 Drew 709.

8 *Lucas v James* (1849) 7 Hare 410 at 425. Where the only defence to a claim for specific performance is an objection to title, a vendor and purchaser summons may be used as an alternative: see PARA 910 ante.

9 *Baskcomb v Phillips* (1859) 29 LJ Ch 380.

10 *Wilson v Williams* (1857) 3 Jur NS 810.

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(1) INSTITUTION OF PROCEEDINGS/(iv) Pleading/925. Default judgments.

### **925. Default judgments.**

If the plaintiff in a High Court action has served a statement of claim and the defendant has not served a defence within the requisite time, the plaintiff may apply for judgment for specific performance and any ancillary or alternative relief claimed in the writ and statement of claim<sup>1</sup>. The plaintiff will not be granted any relief not claimed in the writ and statement of claim<sup>2</sup> and cannot rely on any facts not pleaded in the statement of claim. Thus a plaintiff will not be given judgment for interest at the contractual rate unless he has pleaded the relevant term of the contract<sup>3</sup>. An application for a default judgment is normally made in the Queen's Bench Division by summons to a master and in the Chancery Division by motion for judgment<sup>4</sup>. The summons or notice of motion must specify or be accompanied by a draft of the precise form of order sought by the plaintiff<sup>5</sup>.

1 See RSC Ord 19 r 7(1). As to default judgments generally see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq. The plaintiff cannot obtain a default judgment for specific performance without first serving a statement of claim, even if the defendant has failed to give notice of intention to defend: see Ord 13 r 6(1). As to ancillary or alternative relief see PARA 921 ante.

2 *Stone v Smith* (1887) 35 ChD 188; *Kingdon v Kirk* (1887) 37 ChD 141; *Tacon v National Standard Land Mortgage and Investment Co* (1887) 56 LJ Ch 529.

3 *Palmer v Lark* [1945] Ch 182, [1945] 1 All ER 355.

4 As to the procedure on motion or summons for a default judgment see CIVIL PROCEDURE.

5 *De Jongh v Newman* (1887) 56 LT 180.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(2) PROCEEDINGS FOR SUMMARY JUDGMENT/926.  
 Form of procedure.

## (2) PROCEEDINGS FOR SUMMARY JUDGMENT

### 926. Form of procedure.

In any action in the Chancery Division<sup>1</sup> begun by writ indorsed with a claim for specific performance of an agreement for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property<sup>2</sup>, with or without an alternative claim for damages<sup>3</sup>, or for rescission of such an agreement<sup>4</sup>, or for the forfeiture or return of the deposit<sup>5</sup>, then, whether or not the defendant has acknowledged service of the writ<sup>6</sup>, the plaintiff may apply to the court for judgment<sup>7</sup>. The application is made by summons<sup>8</sup> supported by an affidavit (which, unless the court otherwise directs, may contain statements of information or belief with the sources and grounds thereof) verifying the facts on which the action is based and stating that in the deponent's belief there is no defence to it<sup>9</sup>. The court may thereupon give judgment for the plaintiff in the action unless the defendant<sup>10</sup> satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action<sup>11</sup>. However, if the only issue is a short matter of construction involving a few documents, the court can decide the issue on an application for summary judgment<sup>12</sup>. A summary order for specific performance may be made by a master, except in a case which involves an injunction, such as specific performance of repairing covenants<sup>13</sup>. If the case is not within the scope of the summary judgment jurisdiction or if it appears to the court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs<sup>14</sup>.

Judgment given against a defendant who does not appear at the hearing of an application may be set aside or varied on such terms as the court thinks just<sup>15</sup>. Where a defendant has served a counterclaim on the plaintiff<sup>16</sup>, the defendant may apply to the court for judgment on the ground that the plaintiff has no defence to the claim<sup>17</sup>.

Summary judgment may be ordered for specific performance of a contract for the sale of property situated outside the jurisdiction<sup>18</sup>.

1 In a claim for specific performance in the Queen's Bench Division, summary judgment may be given under RSC Ord 14: see CIVIL PROCEDURE.

2 This includes personal as well as real property, and an agreement either to purchase shares or to find a purchaser for them is an agreement for the sale or purchase of property: *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688. The words 'sale' and 'purchase' are used in their strict primary meaning, namely a sale or purchase in consideration of a money payment: *Robshaw Bros Ltd v Mayer* [1957] Ch 125, [1956] 3 All ER 833; *Young v Markworth Properties Ltd* [1965] Ch 475, [1965] 1 All ER 834. A contract to transfer a house to a builder in consideration of the erection by him of another house on a plot belonging to the transferor is not a sale or exchange: *Doyle v East* [1972] 2 All ER 1013, [1972] 1 WLR 1080.

3 RSC Ord 86 r 1(1)(a). This covers a case where the plaintiff elects to treat the contract as repudiated (see PARA 922 ante), and only asks for damages: *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688.

4 RSC Ord 86 r 1(1)(b).

5 RSC Ord 86 r 1(1)(c). As to pleading additional and alternative relief see PARA 921 ante.

6 RSC Ord 86 r 1(2).

7 RSC Ord 86 r 1(1). See further CIVIL PROCEDURE.

8 The summons must set out or have attached to it minutes of the judgment sought by the plaintiff: RSC Ord 86 r 2(2). For forms of summons and minutes see Court Forms.

9 RSC Ord 86 r 2(1). For forms of affidavit see Court Forms. The summons, together with a copy of the supporting affidavit and any exhibits, must be served on the defendant not less than four clear days before the return day: RSC Ord 86 r 2(3).

10 The defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court: RSC Ord 86 r 4(1). As to leave to defend see PARA 927 post. The court may order a defendant showing cause or, in the case of a corporation, its director, manager, secretary or similar officer or any person purporting to act as such to produce any document and, if it appears desirable because of special circumstances, to attend and be examined on oath: Ord 86 r 4(3). Cases in which it is desirable to give leave to cross-examine are rare, and if it appears from the affidavit that there are material issues of fact, leave to defend should be given: *Sullivan v Henderson* [1973] 1 All ER 48, [1973] 1 WLR 333.

11 RSC Ord 86 r 3. See *Citytowns Ltd v Bohemian Properties Ltd* [1986] 2 EGLR 258.

12 *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913.

13 See RSC Ord 86 r 2; *Practice Direction (Chancery Division)* 13, Supreme Court Practice vol 2 para 854. As to the jurisdiction and powers of Chancery masters see CIVIL PROCEDURE vol 11 (2009) PARA 10.

14 RSC Ord 86 r 6. Unless the plaintiff is a legally assisted person the court may require him to pay the costs forthwith: Ord 86 r 6.

15 RSC Ord 86 r 7.

16 Ie including any such claim as is specified in RSC Ord 86 r 1(1): see the text and notes 1-5 supra.

17 RSC Ord 86 r 8(1). Order 86 rr 2-7 apply in relation to such an application as if the counterclaim were an action: Ord 86 r 8(2).

18 *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 943, CA. As to jurisdiction over foreign property see CONFLICT OF LAWS.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(2) PROCEEDINGS FOR SUMMARY JUDGMENT/927.  
Leave to defend.

### **927. Leave to defend.**

On an application for summary judgment for specific performance<sup>1</sup>, leave to defend may be given to the defendant unconditionally or conditionally<sup>2</sup>, and, where leave to defend is given, the court must give directions as to the further conduct of the action<sup>3</sup>.

1 As to applications for summary judgment see PARA 926 ante.

2 RSC Ord 86 r 4(2). Leave may be given on such terms as to giving security or time or mode of trial or otherwise as the court thinks fit: Ord 86 r 4(2). For an order see Court Forms.

3 RSC Ord 86 r 5. In such a case Ord 25 rr 2-7, with the omission of so much of Ord 25 r 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if the application for summary judgment were a summons for directions: Ord 86 r 5.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(2) PROCEEDINGS FOR SUMMARY JUDGMENT/928.  
Proceedings by and against the Crown.

### **928. Proceedings by and against the Crown.**

Where an application for summary judgment for specific performance<sup>1</sup> is made in proceedings by the Crown, the cause of action must be verified by an affidavit made by an officer authorised by the department concerned or by the solicitor acting for the Crown or an officer authorised by him stating that to the best of his knowledge and belief the plaintiff is entitled to the relief claimed and that there is no defence<sup>2</sup>.

No application may be made for summary judgment in proceedings against the Crown<sup>3</sup>.

1 As to applications for summary judgment see PARA 926 ante.

2 RSC Ord 77 r 7(2). As to proceedings by and against the Crown generally see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 127 et seq.

3 RSC Ord 77 r 7(1).

### **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(2) PROCEEDINGS FOR SUMMARY JUDGMENT/929.  
Costs.

### **929. Costs.**

Costs are not normally taxed until the conclusion of the cause or matter in which the proceedings arise<sup>1</sup>. If, however, it appears to the court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage, it may order accordingly, unless the person against whom the order for costs is made is a legally assisted person within the meaning of the statutory provisions relating to legal aid<sup>2</sup>.

1 See RSC Ord 62 r 8(1).

2 See RSC Ord 62 r 8(2).

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(3) INTERLOCUTORY PROCEEDINGS/930. Appeals.

### **(3) INTERLOCUTORY PROCEEDINGS**

#### **930. Appeals.**

Leave to appeal is required in the case of an appeal against any interlocutory order or interlocutory judgment made or given by the High Court or any other court<sup>1</sup>. Leave may be given by the court of first instance or the Court of Appeal<sup>2</sup>. An order for summary judgment<sup>3</sup> is an interlocutory order<sup>4</sup>.

1 Supreme Court Act 1981 s 18(1A) (added by the Courts and Legal Services Act 1990 s 7(1)); RSC Ord 59 r 1B(1)(f) (the exceptions to which are not relevant in this context).

2 RSC Ord 59 r 1B(3).

3 As to applications for summary judgment for specific performance see PARA 926 ante.

4 RSC Ord 59 r 1A(6)(aa). Any judgment or order under Ord 86 is included: Ord 56 r 1A(6)(aa).

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **930 Appeals**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(3) INTERLOCUTORY PROCEEDINGS/931.  
 Interlocutory relief.

### **931. Interlocutory relief.**

The court has power to make an interlocutory order to enforce the performance of a contractual obligation<sup>1</sup>. In a purchaser's action, the defendant may be restrained by injunction from disposing of the property or creating rights over it inconsistent with the terms of the contract<sup>2</sup>. The defendant may also be restrained by injunction from damaging the subject matter of the contract<sup>3</sup> or taking it out of the jurisdiction<sup>4</sup>. The court has power to make an order for the detention, custody or preservation of any property which is the subject matter of the action or for the inspection of any such property in the possession of a party<sup>5</sup>. If it is necessary for the preservation of the property, the court may appoint some person to act as receiver pending the determination of the proceedings<sup>6</sup>. If the subject matter of the sale is property (such as farm land) which needs to be worked in order to prevent deterioration, the receiver may also be appointed to act as manager<sup>7</sup>.

<sup>1</sup> *Smith v Peters* (1875) LR 20 Eq 511 (order to permit valuer to enter premises); *Astro Exito Navegacion SA v Southland Enterprise Co Ltd, the Messiniaki Tolmi* [1981] 2 Lloyd's Rep 595, CA; further proceedings [1982] QB 1248, [1982] 3 All ER 335, CA; affd [1983] 2 AC 787, [1983] 2 All ER 725, HL (order directing buyer to give instructions for payment under letter of credit). As to interlocutory applications generally see CIVIL PROCEDURE vol 11 (2009) PARAS 316, 383 et seq, 451.

<sup>2</sup> *Curtis v Marquis of Buckingham* (1814) 3 Ves & B 168. In the case of contracts for the sale of land, however, relief of this kind is usually unnecessary because an estate contract can be protected by registration under the Land Charges Act 1972 (in the case of unregistered land) or by entry of a notice or caution on the register of title under the Land Registration Act 1925: see LAND CHARGES vol 26 (2004 Reissue) PARA 632; LAND REGISTRATION. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990: see the Registration of Title Order 1989, SI 1989/1347; and LAND REGISTRATION. As to injunctions in aid of specific performance see CIVIL PROCEDURE vol 11 (2009) PARA 469.

<sup>3</sup> *Crockford v Alexander* (1808) 15 Ves 138.

<sup>4</sup> *Hart v Herwig* (1873) 8 Ch App 860. As to the grant of interlocutory injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 383 et seq.

<sup>5</sup> See RSC Ord 29 r 2; and CIVIL PROCEDURE; CCR Ord 13 r 7(1)(b).

<sup>6</sup> See *Boehm v Wood* (1820) 2 Jac & W 236; *Stilwell v Wilkins* (1821) Jac 280. See generally RECEIVERS vol 39(2) (Reissue) PARA 330 et seq.

<sup>7</sup> *Hyde v Warden* (1876) 1 Ex D 309, CA. See also RECEIVERS vol 39(2) (Reissue) PARA 482 et seq. A similar appointment can be made where the action is for rescission of the contract: *Gibbs v David* (1875) LR 20 Eq 373; *Cook v Andrews* [1897] 1 Ch 266.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **931 Interlocutory relief**

NOTE 2--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(3) INTERLOCUTORY PROCEEDINGS/932. Payment into court.

### **932. Payment into court.**

If the purchaser has been let into possession of the property the court may make an interlocutory order directing him to pay the purchase price into court<sup>1</sup>, although the order will usually give the purchaser the option of giving up possession of the property instead<sup>2</sup>. If the purchaser has done something to prejudice the value of the property he may be ordered to pay the purchase price into court without an option to give up possession<sup>3</sup>, but in view of the possibility of obtaining summary judgment this power should be exercised only in an extreme case<sup>4</sup>. Payment into court will not be ordered if the contract expressly provides for the purchaser to take possession before completion<sup>5</sup>, unless the purchaser has performed acts of ownership which alter the nature of the property<sup>6</sup>. If the purchaser of a lease at a premium is let into possession and pays rent, it is inappropriate to order him to pay the premium into court or give up possession<sup>7</sup>. An order for payment into court will also be refused if the delay in completion is due to the fault of the vendor<sup>8</sup> or if the purchaser is in possession by virtue of some independent right such as a tenancy<sup>9</sup>. Payment into court under a court order does not release the purchaser from the obligation to pay interest at the rate specified in the contract<sup>10</sup>. An order may be made for payment of royalties into court in an action for specific performance of a lease of a mine where the defendant has been allowed into possession<sup>11</sup>. A stakeholder may be ordered to pay the deposit into court<sup>12</sup>.

1 *Buck v Lodge* (1812) 18 Ves 450; *Lilley v Allen* (1866) 14 LT 52.

2 *Clarke v Wilson* (1808) 15 Ves 317; *Gibson v Clarke* (1813) 1 Ves & B 500; *Tindal v Cobham* (1835) 2 My & K 385; *Greenwood v Turner* [1891] 2 Ch 144; *Re Cassano and Mackay's Contract* [1920] WN 7.

3 *Pope v Great Eastern Rly Co* (1866) LR 3 Eq 171.

4 *Maskell v Ivory* [1970] Ch 502, [1970] 1 All ER 488.

5 *Pryse v Cambrian Rly Co* (1867) 2 Ch App 444.

6 *Dixon v Astley* (1816) 1 Mer 133; *Cutler v Simons* (1816) 2 Mer 103. Cf *Gell v Watson* (1818) 3 Madd 225.

7 *Joel v Montgomery and Taylor Ltd* [1967] Ch 272, [1966] 3 All ER 763.

8 *Fox v Birch* (1815) 1 Mer 105.

9 *Freebody v Perry* (1815) Coop G 91; *Robertshaw v Bray* (1866) 35 LJ Ch 844.

10 *Pearlberg v May* [1951] Ch 699, [1951] 1 All ER 1001, CA.

11 *Lewis v James* (1886) 32 ChD 326, CA. Cf *Faulkner v Llewellyn* (1862) 31 LJ Ch 549.

12 *Yates v Farebrother* (1819) 4 Madd 239.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(i) Judgment for Specific Performance/933. Form of judgment.

## **(4) RELIEF**

### **(i) Judgment for Specific Performance**

#### **933. Form of judgment.**

The judgment for specific performance generally commences with a declaration that the agreement in question ought to be specifically performed and orders and adjudges the same accordingly. The judgment then usually includes directions consequent on the declaration, which vary according to the circumstances of the case<sup>1</sup>. Thus, the judgment may include an inquiry as to damages suffered by the plaintiff by reason of the defendant's delay<sup>2</sup>, and a reference to chambers for an inquiry as to the vendor's title<sup>3</sup>. Where the vendor has a lien<sup>4</sup> for unpaid purchase money on the property sold, a declaration of the lien may be embodied in the judgment, with liberty to apply to enforce the lien if the vendor so desires<sup>5</sup>. Again, where the vendor's title has been accepted by or forced on the purchaser, the judgment may contain directions for the ascertainment of how much is payable by the purchaser in respect of the purchase money, whether with or without interest<sup>6</sup>, and whether with or without compensation or abatement<sup>7</sup>. It may also contain special directions as to the rents or the deterioration of the property<sup>8</sup>. On payment of what is due from the purchaser the judgment may direct a conveyance by the vendor, a vesting order or the appointment of a person to convey<sup>9</sup>. Orders dealing with the deposit may also be necessary<sup>10</sup>, and, in the case of agreements for leases, special forms of order are required<sup>11</sup>.

If an inquiry as to the vendor's title is ordered, any provisions of the order which are dependent on the outcome of the inquiry may be omitted, and the case will be restored for further consideration after the inquiry has been held<sup>12</sup>.

1 See eg Court Forms.

2 Court Forms; see *Bennett v Stone* [1902] 1 Ch 226 at 236-238; affd [1903] 1 Ch 509, CA (order for accounts not on footing of wilful default; vendors occupying and farming the land not charged with occupation rent, but with proceeds of crops less expenses of realisation, without allowance for losses in farming). As to damages for delay see PARA 962 post. As to a successful purchaser bringing into account, against the purchase money due to vendor, the costs payable by the vendor see *Green v Sevin* (1879) 13 ChD 589 at 602; distinguish *Phillips v Howell* [1901] 2 Ch 773 at 778 (rule limited to cases where debts are between the parties in the same capacity); and see CIVIL PROCEDURE vol 11 (2009) PARA 667 et seq.

3 See Court Forms; and PARA 934 et seq post.

4 As to the lien of an unpaid vendor of land see LIEN vol 68 (2008) PARA 859 et seq.

5 *Walker v Ware, Hadham and Buntingford Rly Co* (1865) LR 1 Eq 195; *Sedgwick v Watford and Rickmansworth Rly Co* (1867) 36 LJ Ch 379, where an immediate sale was ordered; *Vyner v Hoylake Rly Co* (1868) 17 WR 92; *Wing v Tottenham and Hampstead Junction Rly Co* (1868) 3 Ch App 740; *Munns v Isle of Wight Rly Co* (1870) 5 Ch App 414; *Keane v Athenry and Ennis Junction Rly Co* (1870) 19 WR 43; *Bee v Stafford and Uttoxeter Rly Co* (1875) 23 WR 868. See also Court Forms.

6 See Court Forms. For a form of judgment where a purchaser who had been let into possession at a rent failed to complete see *Mutual Investment Society v Johns* [1934] WN 59. As to interest on purchase money see PARAS 942-944 post.

7 See Court Forms. As to specific performance with compensation see PARA 948 et seq post.

- 8 See Court Forms. As to right to rents see PARA 941 post; and as to deterioration see PARA 945 post.
- 9 See Court Forms. The order should provide for the simultaneous delivery of the conveyance and payment of the purchase money with interest and costs: see *Cooper v Morgan* [1909] 1 Ch 261; *Palmer v Lark* [1945] Ch 182, [1945] 1 All ER 355. See also SALE OF LAND vol 42 (Reissue) PARA 247 et seq; and Court Forms.
- 10 See Court Forms . As to the deposit see PARAS 946-947 post.
- 11 See Court Forms ; and *Strelley v Pearson* (1880) 15 ChD 113; *Eadie v Addison* (1882) 52 LJ Ch 80. As to specific performance of agreements for leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 95-97.
- 12 See Court Forms.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/934. Nature and purpose of reference of title.

## (ii) Reference of Title

### 934. Nature and purpose of reference of title.

In actions for specific performance it is often necessary to determine whether or not the vendor can make a good title<sup>1</sup>, since the court does not grant the remedy of specific enforcement of a sale unless it is satisfied that the vendor has such a title as the purchaser either is willing, or can be forced, to accept<sup>2</sup>. It follows that a reference of title is generally ordered in a vendor's action on the purchaser's application<sup>3</sup>, and will also be ordered in a purchaser's action, unless the purchaser has accepted the title or waived any objection to it<sup>4</sup>. A vendor cannot be permitted to take exception to his own title<sup>5</sup>.

1 As to the extent of the vendor's obligation to make a good title and the mode of investigation and proof of the vendor's title, so far as they relate to contracts for the sale of land, see SALE OF LAND vol 42 (Reissue) PARA 137 et seq. An inquiry into title may, of course, be directed in other matters than sale of land, such as contracts for sale of shares: *Shaw v Fisher* (1848) 2 De G & Sm 11; *Curling v Flight* (1848) 2 Ph 613.

2 As to adequacy of title see PARA 876 ante.

3 *Jenkins v Hiles* (1802) 6 Ves 646, where the purchaser admitted that he had no specific objection, but an inquiry was ordered; *Lesturgeon v Martin* (1834) 3 My & K 255, where a general inquiry was ordered, even though the purchaser admitted that he had only one particular objection. Cf *Fleetwood v Green* (1809) 15 Ves 594. Where a defect of title appears on the pleadings or is proved at the hearing the court may decide against the title without ordering an inquiry: cf *Lucas v James* (1849) 7 Hare 410 at 425 per Wigram V-C; *Baskcomb v Phillips* (1859) 29 LJ Ch 380. See also PARA 924 ante. A delay by a purchaser in raising a patent objection may result in his being ordered to pay the costs of the inquiry: see *Curling v Austin* (1862) 2 Drew & Sm 129; *Upperton v Nickolson* (1871) 6 Ch App 436.

4 However, the purchaser may have to bear the costs of the inquiry if it appears that the vendor had at the proper time disclosed a good title (*Lyle v Earl of Yarborough* (1859) John 70), or if he afterwards waives his objections (*Bennett v Fowler* (1840) 2 Beav 302). For a form of order for reference of title see Court Forms.

5 *Bradley v Muntion* (1852) 15 Beav 460.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/935. Limitations on the inquiry.

### **935. Limitations on the inquiry.**

The reference of title, although in general terms, is confined to such title as under the conditions of the contract the vendor is bound to show. These conditions may restrict the purchaser's right to object to the title, or to make requisitions or inquiries from the vendor as to his title, or may preclude the purchaser from inquiring into or objecting to certain parts of the title<sup>1</sup>.

A reference of title is not ordered where the vendor expressly sells merely such interest as he has<sup>2</sup>, or such title as he himself bought with<sup>3</sup>, or where the contract is not so much a contract of sale as a compromise of disputed rights<sup>4</sup>, or where the contract was for the sale of the vendor's share and interest in property and not the property itself<sup>5</sup>.

1 As to the effect and validity of conditions restricting the vendor's obligations to prove his title see SALE OF LAND vol 42 (Reissue) PARA 90 et seq. As to the covenants for title implied by statute on the disposition of a property see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and REAL PROPERTY; SALE OF LAND.

2 *Southby v Hutt* (1837) 2 My & Cr 207 at 212. See also SALE OF LAND vol 42 (Reissue) PARA 94.

3 *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666 at 669. See also *Re Duthy and Jesson's Contract* [1898] 1 Ch 419 (best title vendors can give).

4 *Godson v Turner* (1851) 15 Beav 46. Cf *Ashton v Wood* (1857) 3 Jur NS 146.

5 *Phipps v Child* (1857) 3 Drew 709.

### **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/936. Waiver as a bar to reference.

### **936. Waiver as a bar to reference.**

A reference of title is not ordered even though the party claiming it is prima facie entitled to have it, if he has waived the right to it either expressly<sup>1</sup> or by implication<sup>2</sup>. The waiver may go to the whole of the title, or merely to some particular objection or objections<sup>3</sup>.

Even where the purchaser's acts have been held to constitute a waiver of his right to investigate the vendor's title, the court may not enforce the contract where it has appeared by other means that the vendor's title was defective<sup>4</sup>. Conversely, a purchaser may himself cure a defect, which he will thus be debarred from objecting to, and specific performance will be ordered<sup>5</sup>.

A waiver must be expressly pleaded<sup>6</sup>, and must be established at the hearing, so that a vendor cannot adduce evidence of waiver on an inquiry as to title<sup>7</sup>. So far as relates to negating the implication of law as to the obligation to make a good title, there is no distinction between waiver of a defect after contract and before the hearing and knowledge of the defect at the time of the contract<sup>8</sup>.

1 Eg by admitting the plaintiff's title in the defence in an action for specific performance: cf *Phipps v Child* (1857) 3 Drew 709. An express waiver may be either absolute or conditional: *Townley v Bond* (1843) 4 Dr & War 240 at 261.

2 The implied waiver must be clear and free from surprise or misrepresentation on the part of the vendor: see *Jenkins v Hiles* (1802) 6 Ves 646 at 655; *Haydon v Bell* (1838) 1 Beav 337; *Blacklow v Laws* (1842) 2 Hare 40. As to acceptance of title generally see SALE OF LAND vol 42 (Reissue) PARAS 174-176.

3 *Corless v Sparling* (1874) 8 IR Eq 335.

4 *Warren v Richardson* (1830) You 1. See also SALE OF LAND vol 42 (Reissue) PARA 90.

5 *Murrell v Goodyear* (1860) 1 De G F & J 432, where the purchaser was allowed to claim the cost of curing the defect as a deduction from the purchase price.

6 *Clive v Beaumont* (1848) 1 De G & Sm 397. See also PARA 924 ante.

7 *McGrory v Alderdale Estate Co Ltd* [1918] AC 503, HL.

8 *McGrory v Alderdale Estate Co Ltd* [1918] AC 503 at 508, HL, per Lord Finlay LC.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/937. Form and scope of reference.

### **937. Form and scope of reference.**

The reference of title may be expressly limited in accordance with the requirements of the case<sup>1</sup> or it may be open and general<sup>2</sup>. It is directed not merely to the question of whether or not a good title is made out, but also, where necessary, to the time when such title was shown<sup>3</sup>.

The reference of title may be ordered on interlocutory motion<sup>4</sup>. This is, however, rarely done because where the only issue is whether the vendor can show a good title the issue can usually be more quickly and cheaply resolved by a vendor and purchaser summons<sup>5</sup>.

1 *Hume v Pocock* (1865) LR 1 Eq 423; affd (1866) 1 Ch App 379. See also *Remnant v Holt* (1847), cited in 3 Seton's Judgments and Orders (7th Edn) 2160; *Saul v Bolton* (1852), cited in 3 Seton's Judgments and Orders (7th Edn) 2159.

2 *Harnett v Baker* (1875) LR 20 Eq 50, where the conditions were held to be misleading; an open reference was offered, and, being refused by the vendor, the claim was dismissed.

3 *Foxlowe v Amcoats* (1840) 3 Beav 496. See also Court Forms. This inquiry is generally necessary for the purpose of determining the date from which interest is payable by the purchaser (see PARAS 942-944 post), and also in connection with the question of liability for costs (see PARA 940 post). A good title is shown, as opposed to being made, when the necessary facts and documents are set out in the abstract: *Parr v Lovegrove* (1857) 4 Drew 170 at 176; see also *Sherwin v Shakspeare* (1853) 17 Beav 267 at 275; and SALE OF LAND vol 42 (Reissue) PARA 141 et seq.

4 See RSC Ord 43 r 2 (jurisdiction to order inquiries at any stage: see CIVIL PROCEDURE vol 12 (2009) PARA 1525). See also *Phillipson v Gibbon* (1871) 6 Ch App 428.

5 See the Law of Property Act 1925 s 49(1); and PARA 910 ante.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/938. Procedure.

### **938. Procedure.**

Where the judgment of the court makes it necessary to proceed in chambers, as on a reference as to title<sup>1</sup>, the court, when giving judgment or at any time during proceedings under the judgment, may give further directions for the conduct of those proceedings<sup>2</sup>. Evidence of any material facts may be given by affidavit<sup>3</sup>. Difficult questions of title may be referred to one of the conveyancing counsel of the court for his opinion, but a party who objects to that opinion may require the question to be determined by the judge<sup>4</sup>.

The result of the proceedings before the master is stated in the form of an order<sup>5</sup>, which has effect as a final order disposing of the matter<sup>6</sup>, but from which appeal lies to the judge<sup>7</sup>. The order may contain such directions as the master thinks fit as to the further consideration of the matter either in court or in chambers<sup>8</sup>.

1 As to references as to title see PARA 934 et seq ante.

2 RSC Ord 44 r 3(1). The court may, for example, give directions as to the manner in which an inquiry is to be prosecuted (Ord 44 r 3(1)(a)), or as to the preparation and service on the parties of the draft of any deed or other instrument directed by the judgment to be settled by the court and the service of objections to the draft (Ord 44 r 3(1)(c)).

3 RSC Ord 38 r 2(3). As to evidence on affidavit see CIVIL PROCEDURE vol 11 (2009) PARA 866 et seq.

4 See RSC Ord 31 rr 5-8. As to references to conveyancing counsel generally see SALE OF LAND vol 42 (Reissue) PARA 136.

5 RSC Ord 44 r 11(1). The order has immediate binding effect on the parties and copies must be served on such parties as the master may direct: Ord 44 r 11(4).

6 See RSC Ord 44 r 11(2).

7 See RSC Ord 44 r 12(1), which applies Ord 58 r 1 (see CIVIL PROCEDURE) to a master's order under these provisions.

8 RSC Ord 44 r 11(3).

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/939. Consequences of failure to prove title.

### **939. Consequences of failure to prove title.**

If the master's order is against title, the contract is not automatically discharged and the purchaser must apply to the court for an order that the contract be discharged<sup>1</sup>. The court may refuse to order the discharge of the contract if the defect in title has been cured after the date of the master's order<sup>2</sup>. If the contract is discharged, the purchaser will be entitled to damages<sup>3</sup>. The order discharging the contract will normally direct repayment of the deposit, together with interest, unless the right to interest on repayment of a deposit is excluded by the contract<sup>4</sup>. The court may also declare that the purchaser is entitled to a lien on the subject matter of the contract for repayment of the deposit, costs and any interest on damages to which he is entitled<sup>5</sup>.

1 *Halkett v Earl of Dudley* [1907] 1 Ch 590; *Austins of East Ham Ltd v Macey* [1941] Ch 338 at 341, CA, per Sir Wilfred Greene MR; *Singh (Sudagar) v Nazeer* [1979] Ch 474, [1978] 3 All ER 817. These cases, and the cases cited in notes 2-3 infra, were decided on the old master's certificate procedure. For a form of summons for discharge from the contract see Court Forms.

2 *Coffin v Cooper* (1807) 14 Ves 205; *Hume v Pocock* (1866) 1 Ch App 379; *Halkett v Earl of Dudley* [1907] 1 Ch 590.

3 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. The rule in *Bain v Fothergill* (1874) LR 7 HL 158, which formerly limited the damages to the expenses incurred by the purchaser, has been abolished in relation to contracts made on or after 27 September 1989: see the Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 5(3), (4)(a).

4 As to recovery of the deposit see SALE OF LAND vol 42 (Reissue) PARAS 245-246.

5 As to purchaser's lien see LIEN vol 68 (2008) PARA 864 et seq.

### **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(ii) Reference of Title/940. Costs.

#### **940. Costs.**

In an action for specific performance, as in other actions, the costs are in the general discretion of the court subject to the provisions of rules of court<sup>1</sup>. Generally, where the dispute is as to title, the vendor has to pay the costs up to the time when he first showed a good title<sup>2</sup>. However, a purchaser who has caused the litigation by his objections may have to pay the costs if the objections are overruled, even though in some other respect a good title has not been shown at the time of the objection<sup>3</sup>. A purchaser may be deprived of his costs if he raises a successful objection at too late a stage<sup>4</sup>, and a purchaser who raises a successful objection but waives it may be ordered to pay the costs<sup>5</sup>. Costs may be awarded to the vendor if he is unable to show title to the whole subject matter of the contract but the court orders specific performance with compensation<sup>6</sup>, but a vendor may be deprived of his costs if the title is subject to a defect of which he should have known, even though he is able to cure it<sup>7</sup>.

Where a plaintiff issued a writ claiming specific performance after the date on which completion was due to take place, but without having previously served a notice making time of the essence, he was nevertheless awarded the costs of the action as, there clearly being no defence, his equitable right to specific performance had accrued at the date when the writ was issued<sup>8</sup>.

Considerations of costs also turn on whether the case was one proper for determination, without an action, by a vendor and purchaser summons<sup>9</sup>.

1 See the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1)); RSC Ord 62; *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; *Seavision Investment SA v Evannett and Clarkson Puckle Ltd, The Tiburon* [1992] 2 Lloyd's Rep 26, CA; *Steele Ford & Newton v Crown Prosecution Service (No 2)* [1994] 1 AC 22, [1993] 2 All ER 769, HL; and CIVIL PROCEDURE. As to the costs of proceedings for summary judgment under RSC Ord 86 see PARA 929 ante.

2 *Freer v Hesse* (1853) 4 De GM & G 495 at 505; *Phillipson v Gibbon* (1871) 6 Ch App 428 at 434; *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 607.

3 *Bridges v Longman* (1857) 24 Beav 27.

4 *Upperton v Nickolson* (1871) 6 Ch App 436.

5 *Bennett v Fowler* (1840) 2 Beav 302.

6 *Carver v Richards* (1860) 3 LT 142.

7 *Phillipson v Gibbon* (1871) 6 Ch App 428.

8 *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749. See also *Horton v Kurzke* [1971] 2 All ER 577, [1971] 1 WLR 769.

9 See *Lawes v Gibson* (1865) LR 1 Eq 135. As to vendor and purchaser summonses, and the questions properly determinable on them, see PARA 910 ante.

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## **940 Costs**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iii) Interest, Rents and Deterioration/941. Rights as between vendor and purchaser to rents and profits.

### (iii) Interest, Rents and Deterioration

#### 941. Rights as between vendor and purchaser to rents and profits.

On a contract for the sale of real property, the legal estate does not pass until the formal conveyance is executed<sup>1</sup>. If the contract is one of which specific performance can be decreed<sup>2</sup>, then between the date of the contract and the date of the conveyance the legal estate remains in the vendor, but the equitable estate passes to the purchaser<sup>3</sup>. The vendor is entitled to the rents and profits and is liable to bear outgoings up to the time, if any, fixed for completion<sup>4</sup>, or, if no time is fixed, up to the time at which completion ought to take place, that is, as a rule, when a good title is shown<sup>5</sup>. After that date the purchaser is, as a rule, entitled to the rents and profits, but is liable to bear the outgoings and to pay the vendor interest on the unpaid purchase money<sup>6</sup>. Where the purchase price is to be fixed subsequently to the contract, interest does not run until the price is ascertained<sup>7</sup>.

It is a general principle of equity that one party cannot claim simultaneously the benefit of the money and of the land. Hence, unless the contract unequivocally provides otherwise, a purchaser who has been relieved of the obligation to pay interest cannot claim the rents and profits<sup>8</sup>; conversely, a vendor who has elected under the terms of the contract to retain the rents and profits cannot claim interest on the purchase money as well<sup>9</sup>.

Until actual completion, the rents and profits will normally continue to be collected by the vendor, but if the purchaser is entitled to them in equity the vendor will receive them as trustee for the purchaser and will have to account for them to the purchaser on completion<sup>10</sup>.

1 See eg *Fludyer v Cocker* (1805) 12 Ves 25 at 27 per Grant MR.

2 As to contracts of which specific performance will not be decreed see PARA 805 et seq ante.

3 The interest conferred by the agreement is an interest commensurate with the relief which equity would give by way of specific performance: see *Howard v Miller* [1915] AC 318 at 326, PC, per Lord Parker; *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266 at 272, PC, per Lord Parker. See also *Rose v Watson* (1864) 10 HL Cas 672 at 678 per Lord Westbury LC; *Raffety v Schofield* [1897] 1 Ch 937 at 943 per Romer J; *Cornwall v Henson* [1899] 2 Ch 710 at 714 per Cozens-Hardy J. If the contract goes off, the equitable estate reverts in the vendor: see *Wall v Bright* (1820) 1 Jac & W 494 at 501 per Plumer MR. For a fuller discussion of the respective rights of a vendor and purchaser between contract and conveyance see SALE OF LAND vol 42 (Reissue) PARA 177 et seq.

4 See *Binks v Lord Rokeby* (1818) 2 Swan 222 at 225; *Esdaile v Stephenson* (1822) 1 Sim & St 122; *Carrodus v Sharp* (1855) 20 Beav 56 at 58; *Wells v Maxwell (No 2)* (1863) 32 Beav 550; *Re Keeble and Stillwell's Fletton Brick Co* (1898) 78 LT 383; *Plews v Samuel* [1904] 1 Ch 464.

5 *Pincke v Curteis* (1793) 4 Bro CC 329; *Enraght v Fitzgerald* (1842) 2 Dr & War 43; *Carrodus v Sharp* (1855) 20 Beav 56; *Barsht v Tagg* [1900] 1 Ch 231 at 235; *Halkett v Earl of Dudley* [1907] 1 Ch 590. See also SALE OF LAND vol 42 (Reissue) PARA 124 et seq, 188 et seq.

6 See *Fletcher v Lancashire and Yorkshire Rly Co* [1902] 1 Ch 901 at 908. See also the cases cited in notes 4-5 supra. For a form of order as to interest and rents see Court Forms. The rate of interest is normally fixed by the contract, but if no rate is fixed the appropriate rate is probably the rate payable on special account (previously short-term investment account) under the Administration of Justice Act 1982 s 38(4) (as amended), s 38(7); and under the Court Funds Rules 1987 rr 26, 27: see *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139. See also SALE OF LAND vol 42 (Reissue) PARA 195 text and notes 3-4.

7 *Catling v Great Northern Rly Co* (1869) 18 WR 121.

8 See *Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298.

9 See SALE OF LAND vol 42 (Reissue) PARA 188 et seq.

10 *Lysaght v Edwards* (1876) 2 ChD 499; *Clarke v Ramuz* [1891] 2 QB 456, CA; *Plews v Samuel* [1904] 1 Ch 464. See also SALE OF LAND vol 42 (Reissue) PARA 178.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iii) Interest, Rents and Deterioration/942. Interest on purchase money where the vendor is in possession.

#### **942. Interest on purchase money where the vendor is in possession.**

Apart from the special terms of the contract, the following rules as to interest<sup>1</sup> apply:

- 29 (1) if there is delay in completion which is due to the default of the vendor, and the interest is in excess of the rents, the purchaser is not liable to pay interest during the period of delay, but the vendor retains the rents<sup>2</sup>, although where the delay is due to the fault of the purchaser, interest runs from the proper date for completion<sup>3</sup>;
- 30 (2) if, where completion is delayed through the vendor's fault, the purchaser appropriates the purchase money and gives notice of the appropriation to the vendor, it appears that the vendor is only entitled to the interest, if any, accruing on the money so appropriated<sup>4</sup>.

1 As to the rate of interest where none is specified by the contract see PARA 941 note 6 ante.

2 *Esdaile v Stephenson* (1822) 1 Sim & St 122; *Paton v Rogers* (1822) 6 Madd 256; *Jones v Mudd* (1827) 4 Russ 118; *Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298. As to the proper date for completion see SALE OF LAND vol 42 (Reissue) PARA 120 et seq.

3 *Binks v Lord Rokeby* (1818) 2 Swan 222; *Monro v Taylor* (1852) 3 Mac & G 713; *Wells v Maxwell (No 2)* (1863) 32 Beav 550; *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 606.

4 *Regent's Canal Co v Ware* (1857) 23 Beav 575; *Re Monckton and Gilzean* (1884) 27 ChD 555. Cf *Re Riley to Streatfield* (1886) 34 ChD 386, where it was held that this principle does not apply to a case of delay by a willing vendor and only applies if there has been a purported repudiation by the vendor. As to appropriation see also SALE OF LAND vol 42 (Reissue) PARA 197.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iii) Interest, Rents and Deterioration/943. Express contractual provisions.

### 943. Express contractual provisions.

The rules as to interest<sup>1</sup> may be varied by the special terms of a contract. For instance, (1) rents until completion may be expressly reserved to the vendor<sup>2</sup>; or (2) the contract may provide that the purchaser is to pay interest from the date fixed for completion, notwithstanding delay from any cause whatever, in which case interest is payable even if delay is due to the fault of the vendor<sup>3</sup>, so long as there is on his part no vexatious conduct, bad faith or gross negligence<sup>4</sup>; or (3) the contract may exempt the purchaser from payment of interest only in the case of wilful default on the part of the vendor, this involving actual default on the vendor's part and more than mere mistake or oversight, although not necessarily meaning intentional delay or wilful obstruction<sup>5</sup>. Delay may be due to wilful default if it is caused by the vendor's absence abroad<sup>6</sup> or his failure to apply in good time for any necessary consent<sup>7</sup>.

A vendor in possession himself<sup>8</sup> is charged a fair occupation rent<sup>9</sup>, unless he simply remained in possession owing to the purchaser's default<sup>10</sup>. Liability for outgoings as a rule goes with the right to receive rents<sup>11</sup>.

1 As to interest see PARAS 941-942 ante.

2 In such a case the vendor cannot claim interest unless the contract unequivocally provides otherwise: *Brooke v Champenowne* (1837) 4 Cl & Fin 589 at 611, HL; *Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298.

3 *Sherwin v Shakspeare* (1854) 5 De GM & G 517; *Williams v Glenton* (1866) 1 Ch App 200. See also *Greenwood v Churchill* (1845) 8 Beav 413 (great delay on vendor's part; purchaser ordered to pay interest, but left to apply for compensation); *Rowley v Adams* (1850) 12 Beav 476 (vendor's failure to deliver abstract at due date); *Cowpe v Bakewell* (1851) 13 Beav 421; *Dyson v Hornby* (1851) 4 De G & Sm 481; *Bannerman v Clarke* (1856) 3 Drew 632 (delay through death of vendor); *Vickers v Hand* (1859) 26 Beav 630; *Lord Palmerston v Turner* (1864) 33 Beav 524 (delay through proceedings necessary to perfect vendor's power to sell). See also SALE OF LAND vol 42 (Reissue) PARA 194 et seq. Cf *De Visme v De Visme* (1849) Mac & G 336. As to the effect on a condition of this nature of a deposit by the purchaser of the purchase money at a bank see SALE OF LAND vol 42 (Reissue) PARA 122.

4 *Sherwin v Shakspeare* (1854) 5 De GM & G 517 at 529 per Knight Bruce LJ. See also *Re Kissock and Taylor's Contract* [1916] 1 IR 393; *Sheridan v Higgins* [1971] IR 291.

5 *Bennett v Stone* [1902] 1 Ch 226 at 232; affd [1903] 1 Ch 509, CA.

6 *Re Young and Harston's Contract* (1885) 31 ChD 168, CA; *Re Hetling and Merton's Contract* [1893] 3 Ch 269, CA.

7 *Re Wilson and Stevens' Contract* [1894] 3 Ch 546. See also *Re Bayley-Worthington and Cohen's Contract* [1909] 1 Ch 648; *Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298. For cases where it was held that delay had not been due to wilful default see *Re London Corp'n and Tubbs' Contract* [1894] 2 Ch 524, CA (erroneous description of title); *Re Woods and Lewis' Contract* [1898] 1 Ch 433 (on appeal [1898] 2 Ch 211, CA) (unknown defect of title); *North v Percival* [1898] 2 Ch 128 (vendor's unsuccessful resistance to action for specific performance). See also *Bennett v Stone* [1902] 1 Ch 226 (affd [1903] 1 Ch 509, CA); *Re Kissock and Taylor's Contract* [1916] 1 IR 393.

8 As to the liability of a vendor in receipt of rents to account see PARA 941 ante.

9 *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505; *Metropolitan Rly Co v Defries* (1877) 2 QBD 189 (on appeal 2 QBD 387, CA). See also SALE OF LAND vol 42 (Reissue) PARA 191.

10 *Dakin v Cope* (1827) 2 Russ 170 at 181; *Leggott v Metropolitan Rly Co* (1870) 5 Ch App 716.

11 See *Lawes v Gibson* (1865) LR 1 Eq 135 (ground rent apportioned up to date of completion). Cf *Carrodus v Sharp* (1855) 20 Beav 56; *Williams v East London Rly Co* (1869) 1 LT 524. As to the meaning of 'outgoings' see SALE OF LAND vol 42 (Reissue) PARA 125.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iii) Interest, Rents and Deterioration/944. Interest on purchase money where the purchaser is in possession.

#### **944. Interest on purchase money where the purchaser is in possession.**

If, instead of the vendor remaining in possession<sup>1</sup>, the purchaser has taken possession, he pays interest on the unpaid purchase money from the time of possession<sup>2</sup>, even though the delay in completion has been due to the vendor's fault, and even though no profits have been made out of the land<sup>3</sup>. There must, of course, be a specifically enforceable obligation to purchase, and the purchaser must have taken or obtained, in advance of completion and payment of the price, a sufficient benefit over the property to be purchased or acquired; and the imposition of an obligation to pay interest must, in all the circumstances, be an equitable arrangement<sup>4</sup>. Where delay has arisen, the purchaser may, however, appropriate the purchase money for the purposes of the contract and give notice to the vendor, who is then only entitled to claim such interest as the money so appropriated produces<sup>5</sup>.

1 See PARAS 941-943 ante.

2 *Fludyer v Cocker* (1805) 12 Ves 25 at 27; *Binks v Lord Rokeby* (1818) 2 Swan 222 at 226; *Ballard v Shutt* (1880) 15 ChD 122; *Re Priestley's Contract* [1947] Ch 469, [1947] 1 All ER 716. Where a purchaser has been dispossessed after taking possession he is charged with interest during the period of possession: *Johnston v Johnston* (1869) 3 IR Eq 328. As to contracts exempting a purchaser from paying interest see *Birch v Joy* (1852) 3 HL Cas 565, where possession was held for 40 years before completion and the court refused to give effect to the exemption in the circumstances of the case.

3 *Fludyer v Cocker* (1805) 12 Ves 25; *Ballard v Shutt* (1880) 15 ChD 122; *Beresford v Clarke* [1908] 2 IR 317. In *Cowpe v Bakewell* (1851) 13 Beav 421, the purchaser was put to his election to pay interest or give up the rents. See also *Herbert v Salisbury and Yeovil Rly Co* (1866) LR 2 Eq 221 (interest at increasing rate); *A-G v Dean of Christ Church, Oxford* (1842) 13 Sim 214.

4 *Harrison v Thompson* [1993] BCLC 784, CA.

5 *Kershaw v Kershaw* (1869) LR 9 Eq 56. Cf *Winter v Blades* (1825) 2 Sim & St 393. See also SALE OF LAND vol 42 (Reissue) PARA 197.

### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iii) Interest, Rents and Deterioration/945. Deterioration.

#### **945. Deterioration.**

A vendor, as constructive trustee, is liable for deterioration to the property while he is in possession in the interval before completion, provided the deterioration is due to his wilful default or want of reasonable care<sup>1</sup>, but he is not liable for deterioration occurring without his fault<sup>2</sup>, and still less for deterioration due to the purchaser's own fault<sup>3</sup>. The vendor's obligation to take reasonable care of the property continues until actual completion unless delay in completion is due to the fault of the purchaser<sup>4</sup>. As a rule the vendor is not entitled to be indemnified for the cost of taking care of the property<sup>5</sup>, but in special circumstances he may have a right to an indemnity.

Thus where, in the case of the sale of a business as a going concern, a vendor carries on the business up to the date fixed for completion and within a reasonable time thereafter notifies the purchaser that the business is being carried on at a loss, the vendor is, as against a purchaser who is in default as regards completion, entitled to be indemnified against the loss incurred by carrying on the business<sup>6</sup>. So, also, where a purchaser contracts to buy leaseholds with knowledge of their dilapidated condition subject to the landlord's consent to an assignment, and the vendor has to spend money on repairs in order to obtain that consent, the vendor is entitled to an indemnity from the purchaser against the cost of the repairs<sup>7</sup>.

1 *Foster v Deacon* (1818) 3 Madd 394; *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469 (failure to take steps to keep property in cultivation); *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770, where the vendor removed an ornate door and substituted a plain one, and was ordered to replace the ornate door; *Abdulla v Shah* [1959] AC 124, PC (letting of property without consent of purchaser). The purchaser's right to claim for deterioration may be enforced by action after conveyance in ignorance of the facts (*Clarke v Ramuz* [1891] 2 QB 456, CA; *Connolly v Keating (No 2)* [1903] 1 IR 356), and the claim may be set off against the balance of the purchase money (*Ferguson v Tadman* (1827) 1 Sim 530), or interest (*Phillips v Silvester* (1872) 8 Ch App 173). See further SALE OF LAND vol 42 (Reissue) PARAS 180-181.

2 *Re Sweeny's Estate* (1890) 25 LR Ir 252.

3 *Harford v Purrier* (1816) 1 Madd 532.

4 *Binks v Lord Rokeby* (1818) 2 Swan 222; *Minchin v Nance* (1841) 4 Beav 332; *Sherwin v Shakspeare* (1854) 5 De GM & G 517; *Regent's Canal Co v Ware* (1857) 23 Beav 575.

5 *Re Watford Corpn's and Ware's Contract* [1943] Ch 82, [1943] 1 All ER 54.

6 *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162, following *Shaw v Foster* (1872) LR 5 HL 321, and distinguishing *Dakin v Cope* (1827) 2 Russ 170.

7 *Lockharts v Bernard Rosen & Co* [1922] 1 Ch 433.

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iv) The Deposit/946. Questions as to deposit.

## **(iv) The Deposit**

### **946. Questions as to deposit.**

In an action for specific performance questions may arise as to the deposit paid by the purchaser on the making of the contract<sup>1</sup>, such deposit being in the nature of part payment if the contract is duly completed, or, if the contract fails owing to the default of the purchaser, serving as earnest or security for the due performance of his contract and therefore liable to forfeiture<sup>2</sup>. It follows that if the contract is terminated as the result of a default by the vendor or of the exercise by either party of a right of rescission the purchaser is entitled to repayment of his deposit<sup>3</sup>. The deposit is also returnable if the contract is avoided by the non-occurrence of a condition precedent<sup>4</sup>.

1 A deposit must be carefully distinguished from a payment made on account of the purchase price but not by way of deposit: see *Harrison v Holland and Hannen and Cubitts Ltd* [1922] 1 KB 211, CA; *Mayson v Clouet* [1924] AC 980, PC; *Dies v British and International Mining and Finance Corp'n Ltd* [1939] 1 KB 724. See also *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL; and *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477 (Aust HC), per Dixon J.

2 See SALE OF LAND vol 42 (Reissue) PARA 234.

3 See SALE OF LAND vol 42 (Reissue) PARAS 245-246.

4 *Shires v Brock* (1977) 247 Estates Gazette 127, CA, where the landlord's consent to the assignment of a lease was refused.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(4) RELIEF/(iv) The Deposit/947. Purchaser's claim and counterclaim.

#### **947. Purchaser's claim and counterclaim.**

A purchaser claiming specific performance may, in the alternative, claim a return of the deposit and enforcement of his lien on the property for that amount<sup>1</sup>. Similarly, in a vendor's action for specific performance, the purchaser in resisting the claim may counterclaim for the return of the deposit with interest<sup>2</sup> (unless the right to interest is excluded by the contract) and for enforcement of his lien in respect of it<sup>3</sup>.

It does not, however, necessarily follow that because a vendor is unsuccessful in his claim for specific performance the purchaser is entitled to a return of his deposit<sup>4</sup>.

Similarly, if the purchaser is in default, the fact that the court has refused or might refuse to order specific performance of the contract gives the purchaser no automatic right to return of the deposit<sup>5</sup>. However, the court has a statutory power to order the repayment of the deposit if it thinks fit where it has refused to grant specific performance or in an action for repayment of the deposit<sup>6</sup>. In exercise of this power the court has a wide and general discretion to do justice between the parties, having regard to all relevant considerations, including the terms of the contract<sup>7</sup>, although it may not exercise its powers so as to deprive a purchaser of a legal right to the return of a deposit<sup>8</sup>.

It has been held that if the contractual deposit is due but has not in fact been paid, a vendor who has accepted the purchaser's repudiation of the contract cannot obtain an order for payment of the deposit<sup>9</sup>.

1 See SALE OF LAND vol 42 (Reissue) PARA 245.

2 As to the appropriate rate of interest see PARA 941 note 6 ante.

3 As to the purchaser's lien for repayment of his deposit see *Rose v Watson* (1864) 10 HL Cas 672; *Whitbread & Co Ltd v Watt* [1901] 11 Ch 911 (affd [1902] 1 Ch 835, CA) (purchaser's lien where contract rescinded under a condition of the contract); *Lee-Parker v Izzet* [1971] 3 All ER 1099 at 1106, [1971] 1 WLR 1688 at 1692. See also LIEN vol 68 (2008) PARA 864 et seq. There is no lien if the deposit has been paid to a stakeholder: *Combe v Lord Swaythling* [1947] Ch 625, [1947] 1 All ER 838.

4 *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA. Cf *Re Hughes and Ashley's Contract* [1900] 2 Ch 595 at 602, CA; *Beyfus v Lodge* [1925] Ch 350.

5 *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190; *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA; *Beyfus v Lodge* [1925] Ch 350.

6 See the Law of Property Act 1925 s 49(2); and SALE OF LAND vol 42 (Reissue) PARA 246. For an exercise of this discretionary power see *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287.

7 *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552 at 555, CA, per Buckley LJ. See *Schindler v Pigault* (1975) 30 P & CR 328; *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963; *Maktoum v South Lodge Flats Ltd* (1980) Times, 22 April; *Dimsdale Developments (South East) Ltd v De Haan* (1984) 47 P & CR 1.

8 *James Macara Ltd v Barclay* [1945] KB 148, [1944] 2 All ER 589, CA.

9 *Lowe v Hope* [1970] Ch 94, [1969] 3 All ER 605, not following *Dewar v Mintoft* [1912] 2 KB 373. See, however, *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL, and cf *Hinton v Sparkes* (1868) LR 3 CP 161, and *Bot v Ristevski* [1981] VR 120 (Aust). See also *Millichamp v Jones* [1983] 1 All ER 267 at 272, [1982] 1 WLR 1422 at 1428, where Warner J expressed the view that *Lowe v Hope* supra had been invalidated by *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, which showed that *Dewar v Mintoft* supra was rightly decided.

**UPDATE**

**906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/948. Where the vendor is entitled to specific performance on paying compensation.

## **(5) SPECIFIC PERFORMANCE WITH COMPENSATION**

### **(i) Compensation where there is no Condition for it**

#### **948. Where the vendor is entitled to specific performance on paying compensation.**

A vendor may obtain specific performance conditionally on paying compensation to a purchaser under a contract of sale<sup>1</sup>, even where the vendor is unable to fulfil the exact terms of the bargain, provided (1) that the purchaser will on completion obtain substantially what he bargained for<sup>2</sup>; and (2) that the difference in value between the thing contracted for and the thing sold can be fairly computed.

Thus, specific performance may be granted subject to compensation at the instance of the vendor where an estate is described as freehold and in fact a very small portion is held only from year to year<sup>3</sup>; where, in the case of a large estate, there is an objection to the title of a very small part not material to the enjoyment of the rest<sup>4</sup>; where a small portion of a property is wrongly described<sup>5</sup>; and where, on a purchase by a tenant in possession, the measurements are given inaccurately<sup>6</sup>. Specific performance has also been granted subject to compensation where, on the sale of a colliery, the profits were overstated<sup>7</sup>; where the estate sold was subject to quit rents<sup>8</sup>; and where the vendor was unable to give vacant possession of part of the property<sup>9</sup>.

1 As to compensation under an open contract, and as to conditions providing for the case of errors in description of land and allowing or excluding compensation, see *SALE OF LAND* vol 42 (Reissue) PARAS 110-116. Cf *SB Property Co Ltd v Chelsea Football and Athletic Co Ltd* (1992) 64 P & CR 440, CA.

2 *Rutherford v Acton-Adams* [1915] AC 866 at 869-870, PC, per Viscount Haldane.

3 *Calcraft v Roebuck* (1790) 1 Ves 221 (2 acres out of 186 acres).

4 *M'Queen v Farquhar* (1805) 11 Ves 467.

5 *Scott v Hanson* (1829) 1 Russ & M 128, where 2 acres out of 14 acres were wrongly described as 'meadow'.

6 *King v Wilson* (1843) 6 Beav 124, where property was described as 46 feet in depth, instead of 33 feet. Cf *Corless v Sparling* (1875) 19 Q 595, where specific performance was ordered without compensation where there had been an overstatement as to the acreage of waste land of negligible value included in the contract.

7 *Powell v Elliot* (1875) 10 Ch App 424, where the vendor was allowed to enforce the contract on making compensation to the purchaser by submitting to an abatement from the purchase money bearing the same proportion to the excess as the total purchase money bore to the capitalised value of profits as stated by the vendor.

8 *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 124.

9 *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388, [1979] 1 WLR 446.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/949. Where the vendor is entitled to specific performance without paying compensation.

**949. Where the vendor is entitled to specific performance without paying compensation.**

The court will order specific performance without compensation where the defect in the subject matter of the contract was visible to everybody at the time of the purchase<sup>1</sup>. Where a purchaser, after knowing of a defect, acts in a manner implying a waiver of his right to compensation for that defect, the vendor may insist on completion of the purchase without compensation<sup>2</sup>.

Although it may award damages in such a case<sup>3</sup>, the court will not grant compensation for a misrepresentation which is not contained in the contract<sup>4</sup>; nor will compensation be awarded for non-disclosure of something which is not an incumbrance on the title<sup>5</sup>.

1 *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505 (misdescription of a farm described as lying within a ring fence which did not in fact so lie). Cf *Grant v Munt* (1815) Coop G 173 (compensation given for dry rot); *King v Wilson* (1843) 6 Beav 124.

2 *Burnell v Brown* (1820) 1 Jac & W 168; cf *Hughes v Jones* (1861) 3 De GF & J 307. As to waiver of objections to title generally see SALE OF LAND vol 42 (Reissue) PARAS 174-176.

3 See the Misrepresentation Act 1967 s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801.

4 *Rutherford v Acton-Adams* [1915] AC 866, PC.

5 *Greenhalgh v Brindley* [1901] 2 Ch 324 (no compensation for non-disclosure of deed postponing acquisition of prescriptive right to light; but as it ought in fairness to have been disclosed, no order for costs).

**UPDATE**

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/950. Where the vendor is not entitled to specific performance on paying compensation.

**950. Where the vendor is not entitled to specific performance on paying compensation.**

Where a material part of the subject matter of a contract is wanting, and the vendor cannot substantially give to the purchaser that which he agreed to buy, the court does not grant specific performance with compensation at the instance of the vendor<sup>1</sup>. Thus specific performance with compensation may be refused where third persons have prejudicial rights over the property sold<sup>2</sup>; where, on the sale of a house with land adjoining, the vendor has no title to a strip of land between the house and a road<sup>3</sup>; where the vendor cannot show a title to a substantial part of the property which is material to the enjoyment of the property<sup>4</sup>; where the measurements of the property are substantially less in a material particular than those by which it is described<sup>5</sup>; where the tenure of an estate contracted to be sold is different from that which the vendor represented himself to be selling<sup>6</sup>; where an estate is sold free from incumbrances and is in fact subject to an incumbrance amounting to a substantial part of the purchase money<sup>7</sup>; and where there are restrictive covenants rendering the title to the land sold unmarketable<sup>8</sup>.

Specific performance with compensation is also refused where the amount to be awarded as compensation cannot be fairly ascertained<sup>9</sup>.

1 See also PARA 956 post.

2 *Peers v Lambert* (1844) 7 Beav 546 (right to remove a jetty); *Shackleton v Sutcliffe* (1847) 1 De G & Sm 609 (right of way).

3 *Perkins v Ede* (1852) 16 Beav 193. A part of an estate may be material if in the hands of some person other than the purchaser it could be turned to some purpose prejudicial to the enjoyment of the estate: *Knatchbull v Grueber* (1815) 1 Madd 153 at 167 per Plumer V-C; affd (1817) 3 Mer 124.

4 *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA (material part of frontage).

5 *Re Deptford Creek Bridge Co and Bevan* (1884) 28 Sol Jo 327, CA (wharf 11 feet less than description, which affected use).

6 *Re Lloyds Bank Ltd and Lillingston's Contract* [1912] 1 Ch 601 (property described as leasehold held on underlease of part of property demised by head lease). Cf *Cox v Coventon* (1862) 31 Beav 378.

7 *Wood v Bernal* (1812) 19 Ves 220 at 221 per Lord Eldon LC.

8 *Cato v Thompson* (1882) 9 QBD 616, CA. See also the cases cited in PARA 952 note 4 post.

9 *Nouaille v Flight* (1844) 7 Beav 521; *Lord Brooke v Rounthwaite* (1846) 5 Hare 298, where the amount of timber to be included in the sale was not defined by the contract; *Cato v Thompson* (1882) 9 QBD 616 at 618, CA, per Jessel MR; *Rudd v Lascelles* [1900] 1 Ch 815 (compensation for restrictive covenants held to be incapable of assessment). Cf *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 593, and *Westmacott v Robins* (1862) 4 De GF & J 390.

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**906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/951. Where the purchaser is entitled to specific performance with compensation.

### **951. Where the purchaser is entitled to specific performance with compensation.**

A purchaser may obtain specific performance with compensation against a vendor under a contract of sale where the vendor is unable to fulfil the exact terms of the bargain, but the difference in value between the actual subject matter and that stated in the contract can be measured by the court and form the subject of abatement in the amount of the purchase money<sup>1</sup>. However, the court will not hear the objection by the vendor that the purchaser cannot have the whole<sup>2</sup>.

Thus, specific performance with compensation may be granted where the vendor, who has agreed to sell the fee, has only a partial interest<sup>3</sup>; where the vendor is only entitled to a moiety of the land he has agreed to sell<sup>4</sup>; where there is a deficiency in the acreage of the property sold<sup>5</sup>; where there is a misrepresentation as to the state of the roads on the property sold<sup>6</sup>; and where the property is subject to a mortgage which the purchaser has had to discharge<sup>7</sup>. Where, however, the representation is not made in the contract but is collateral, a purchaser cannot obtain specific performance with compensation<sup>8</sup> and his remedy is rescission of the contract, or a claim for damages<sup>9</sup>.

1 This principle was referred to as 'the doctrine of partial performance' by Slade LJ giving the judgment of the court in *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 235, [1984] 2 All ER 585 at 595, CA. It is to be distinguished from the former doctrine of part performance under the Law of Property Act 1925 s 40 (repealed).

2 *Mortlock v Buller* (1804) 10 Ves 292 at 315 per Lord Eldon LC; *Rudd v Lascelles* [1900] 1 Ch 815 at 818. See also *A-G v Day* (1749) 1 Ves Sen 218 at 224; *Dale v Lister* (circa 1800) cited in 16 Ves at 7; *Milligan v Cooke* (1808) 16 Ves 1; *Western v Russell* (1814) 3 Ves & B 187; *Barnes v Wood* (1869) LR 8 Eq 424; *Rutherford v Acton-Adams* [1915] AC 866 at 870, PC, per Viscount Haldane. Cf *Thomas v Dering* (1837) 1 Keen 729; *Earl of Durham v Sir Francis Legard* (1865) 34 Beav 611. See also *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170 (specific performance on payment of purchase price less the costs of the plaintiff obtaining the removal of the relevant entries on the local land charges register). See SALE OF LAND vol 42 (Reissue) PARA 251.

3 *Mortlock v Buller* (1804) 10 Ves 292 at 315; *Wilson v Williams* (1857) 3 Jur NS 810, where the vendor was entitled only to a reversion. See also the cases cited in SALE OF LAND vol 42 (Reissue) PARA 251 note 3.

4 *Hooper v Smart* (1874) LR 18 Eq 683; *Barker v Cox* (1876) 4 ChD 464; *Horrocks v Rigby* (1878) 9 ChD 180. In *Basma v Weekes* [1950] AC 441, [1950] 2 All ER 146, PC, three tenants in common agreed to sell their interests but one had no power to convey; and an order was made against the others. See also the cases cited in SALE OF LAND vol 42 (Reissue) PARA 251. Cf *Maw v Topham* (1854) 19 Beav 576; *Cedar Holdings Ltd v Green* [1981] Ch 129 at 147, [1979] 3 All ER 117 at 127, CA, per Goff LJ.

5 *Hill v Buckley* (1811) 17 Ves 394; *McKenzie v Hesketh* (1877) 7 ChD 675; *Connor v Potts* [1897] 1 IR 534 at 539. See also *Wheatley v Slade* (1830) 4 Sim 126.

6 *Re Chifferiel, Chifferiel v Watson* (1880) 40 ChD 45 (method of estimating compensation in such a case).

7 *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406.

8 *Rutherford v Acton-Adams* [1915] AC 866, PC; *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493.

9 See the Misrepresentation Act 1967 s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801.

### **UPDATE**



**906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/952. Where the purchaser is not entitled to specific performance with compensation.

**952. Where the purchaser is not entitled to specific performance with compensation.**

Compensation cannot be granted where the vendor has exercised a contractual right to determine the contract rather than complete with compensation<sup>1</sup>; or where the alienation of the partial interest of the vendor might prejudice the rights of third persons<sup>2</sup>; or where the purchaser has from the first been aware of the vendor's incapacity to convey the whole of the property sold<sup>3</sup>; or where the amount of compensation is incapable of computation<sup>4</sup>; or where the enforcement of the contract with compensation would be inequitable<sup>5</sup>; or where it would require the vendor to commit a breach of a pre-existing contract with a third person<sup>6</sup>.

1 *Re Terry and White's Contract* (1886) 32 ChD 14, CA; *Lipman's Wallpaper Ltd v Mason and Hodgton Ltd* [1969] 1 Ch 20, [1968] 1 All ER 1123.

2 *Thomas v Dering* (1837) 1 Keen 729; *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA.

3 *Castle v Wilkinson* (1870) 5 Ch App 534; see also *Carroll v Keayes* (1873) IR 8 Eq 97; *Re Edwards to Daniel Sykes & Co* (1890) 62 LT 445; *Hopcraft v Hopcraft* (1897) 76 LT 341.

4 *Westmacott v Robins* (1862) 3 De GF & J 390; *Cato v Thompson* (1882) 9 QBD 616 at 618, CA; *Rudd v Lascelles* [1900] 1 Ch 815. Cf *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 593. See also *Thomas v Dering* (1837) 1 Keen 729; and cf *Powell v Elliot* (1875) 10 Ch App 424.

5 *Price v North* (1837) 2 Y & C Ex 620 at 626 per Lord Abinger CB; *Earl of Durham v Legard* (1865) 34 Beav 611. Cf *Hill v Buckley* (1811) 17 Ves 394; *McKenzie v Hesketh* (1877) 7 ChD 675; *Rudd v Lascelles* [1900] 1 Ch 815 at 819.

6 *Lipman's Wallpaper Ltd v Mason and Hodgton Ltd* [1969] 1 Ch 20, [1968] 1 All ER 1123.

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Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/953. Indemnity against defect or loss.

### **953. Indemnity against defect or loss.**

Where the defect or loss is not certain but contingent, then, unless the parties have contracted for it, the vendor will not generally be compelled to give<sup>1</sup>, nor the purchaser to take<sup>2</sup>, an indemnity against such defect or loss.

1 *Balmano v Lumley* (1813) 1 Ves & B 224; *Aylett v Ashton* (1835) 1 My & Cr 105; *Bainbridge v Kinnaird* (1863) 32 Beav 346. Where, however, there was a possible claim for estate duty (now replaced by inheritance tax) and the contract contained no mention of a deed of gift or the contingent claim to duty which might flow from it, it was said that specific performance would have been ordered if the vendor had provided an insurance policy within a reasonable time: *Manning v Turner* [1956] 3 All ER 641 at 645, [1957] 1 WLR 91 at 94 per Sir Leonard Stone V-C.

2 *Balmano v Lumley* (1813) 1 Ves & B 224 at 225 per Lord Eldon LC. See also *Wood v Bernal* (1812) 19 Ves 220 at 221; *Fildes v Hooker* (1818) 3 Madd 193; *Nouaille v Flight* (1844) 7 Beav 521 (ambiguous covenant); *Ridgway v Gray* (1849) 1 Mac & G 109 (misdescription); *Re Weston and Thomas's Contract* [1907] 1 Ch 244 (small contingent incumbrance).

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH COMPENSATION/(i) Compensation where there is no Condition for it/954. Compensation after completion.

**954. Compensation after completion.**

If the contract provides for compensation for any error or misstatement in the contract<sup>1</sup>, the purchaser's right to compensation is not lost by completion if he was not then aware of the defect<sup>2</sup>. However, where there is no express condition for payment of compensation and the purchaser could have discovered the defect before completion by the exercise of due diligence, he cannot claim compensation after completion<sup>3</sup>.

1 As to such conditions see SALE OF LAND vol 42 (Reissue) PARA 110 et seq.

2 *Cann v Cann* (1830) 3 Sim 447; *Bos v Helsham* (1866) LR 2 Exch 72; *Re Turner and Skelton* (1879) 13 ChD 130; *Palmer v Johnson* (1884) 13 QBD 351, CA.

3 *Besley v Besley* (1878) 9 ChD 103; *Clayton v Leech* (1889) 41 ChD 103, CA.

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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PROCEEDINGS FOR SPECIFIC PERFORMANCE/(5) SPECIFIC PERFORMANCE WITH  
COMPENSATION/(i) Compensation where there is no Condition for it/955. Alternative relief to  
the purchaser.

**955. Alternative relief to the purchaser.**

When a purchaser fails to establish his right to specific performance with compensation, but would be entitled to rescind the contract, he may be given the option of completing without compensation or having the contract rescinded<sup>1</sup>.

<sup>1</sup> See *Earl of Durham v Legard* (1865) 34 Beav 611; *Re Hare and O'More's Contract* [1901] 1 Ch 93 at 96; *Rutherford v Acton-Adams* [1915] AC 866, PC. As to pleading alternative relief see PARA 921 ante.

**UPDATE**

**906-1000 Proceedings for Specific Performance**

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## **(ii) Compensation where there is a Condition for it**

### **956. Factors determining whether the vendor is entitled to specific performance.**

Conditions of sale are construed strictly against a vendor<sup>1</sup>. Where, therefore, a vendor seeks to enforce specific performance of a contract of sale against a purchaser, a condition in the contract providing for compensation in the event of any error or misstatement in the particulars applies only when on completion the purchaser will get substantially what he contracted for<sup>2</sup>.

If, however, there are material misdescriptions<sup>3</sup>, so that the purchaser will get something substantially different from that which he agreed to buy, specific performance is not ordered against him<sup>4</sup>. Thus, such an order has been refused where property described as copyhold was partly freehold<sup>5</sup>, or where an underlease is described as a lease<sup>6</sup>, or where there is serious misrepresentation as to the rent at which the property has been let<sup>7</sup>. A mere puffing description of the property sold, however, does not of necessity entitle a purchaser to resist specific performance on the ground of misrepresentation<sup>8</sup>.

A condition which provides that errors and misstatements are not to annul a sale and that no compensation is to be allowed does not enable a vendor to enforce specific performance without compensation if the error or misstatement is a substantial one<sup>9</sup>.

The court will not order specific performance with compensation unless the amount of such compensation can be reasonably estimated<sup>10</sup>.

A vendor of several lots to the same purchaser is entitled to compensation for an understatement of the area of one lot on giving compensation for an overstatement in relation to others<sup>11</sup>.

Compensation will not be awarded in respect of a misrepresentation which is not a term of the contract, but in such a case damages for the misrepresentation can be awarded to the purchaser<sup>12</sup>. A provision in the contract excluding any liability for such a misrepresentation will be of no effect unless it was a fair and reasonable one to be included, having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made<sup>13</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179; SALE OF LAND vol 42 (Reissue) PARA 78. As to the construction and effect of conditions of sale, and as to compensation after conveyance, see SALE OF LAND vol 42 (Reissue) PARA 111.

2 *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA, where a house and yard were described as measuring 1,372 square yards, being really 1,033 square yards. The condition may apply even though the error is not a mere triviality: *Re Terry and White's Contract* (1886) 32 ChD 14 at 28, CA, per Lindley LJ; *Re Fawcett and Holmes' Contract* supra at 156 per Lord Esher MR; *Ashburner v Sewell* [1891] 3 Ch 405 at 409 per Chitty J.

3 As to what are material misdescriptions see *Dykes v Blake* (1838) 4 Bing NC 463; *Ayles v Cox* (1852) 16 Beav 23; *Brewer v Brown* (1884) 28 ChD 309; *Jacobs v Revell* [1900] 2 Ch 858 (where the cases are reviewed); *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA. Cf *Re Brewer and Hankins' Contract* (1899) 80 LT 127, CA; *Shepherd v Croft* [1911] 1 Ch 521; *Citytowns Ltd v Bohemian Properties Ltd* [1982] 2 EGLR 258; and the cases cited in note 10 infra.

4 *Flight v Booth* (1834) 1 Bing NC 370 (only two of many prohibited businesses mentioned); *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270 at 279, CA. See also *Duke of Norfolk v Worthy* (1808) 1 Camp 337 at 340; *Powell v Double* (1832), cited in Sugden's Vendors and Purchasers (14th Edn) 29; *Dobell v Hutchinson* (1835) 3 Ad & El 355; and SALE OF LAND vol 42 (Reissue) PARA 111.

5 *Ayles v Cox* (1852) 16 Beav 23. See also *Stewart v Alliston* (1815) 1 Mer 26, where a rack rent was described as a ground rent; cf *Price v Macaulay* (1852) 2 De GM & G 339, where specific performance with compensation was granted; *Evans v Robins* (1862) 8 Jur NS 846; *Hudson v Cook* (1872) LR 13 Eq 417 at 420.

6 *Madeley v Booth* (1848) 2 De G & Sm 718, followed in *Re Beyfus and Master's Contract* (1888) 39 ChD 110, CA, and *Broom v Phillips* (1896) 74 LT 459, although disapproved in *Camberwell and South London Building Society v Holloway* (1879) 13 ChD 754 at 760 per Jessel MR, where however, the conditions in effect gave notice that the lease sold was an underlease. Cf *Tompkins v Pratt* (1915) 139 LT Jo 541, where the conditions provided for the inspection of the 'lease' and that the purchaser should buy with full notice of its contents. See also *Turner v Turner* [1881] WN 70; *Re Lloyds Bank Ltd and Lillingston's Contract* [1912] 1 Ch 601; *Re Russ and Brown's Contract* [1934] Ch 34, CA; and *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA, where a sub-underlease was described as an underlease.

7 *Dimmock v Hallett* (1866) 2 Ch App 21.

8 *Johnson v Smart* (1859) 2 Giff 151 (affd (1860) 2 LT 783); *Dimmock v Hallett* (1866) 2 Ch App 21 at 27.

9 *Whittemore v Whittemore* (1869) LR 8 Eq 603; *Jacobs v Revell* [1900] 2 Ch 858. See also *Portman v Mill* (1826) 2 Russ 570; *Lee v Rayson* [1917] 1 Ch 613; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 785-787; SALE OF LAND vol 42 (Reissue) PARA 115.

10 See the cases cited in PARA 952 note 4 ante; *Magennis v Fallon* (1829) 2 Mol 561 at 589; *Lord Brooke v Rounthwaite* (1846) 5 Hare 298; *Cox v Coventon* (1862) 31 Beav 378.

11 *Leslie v Thompson* (1851) 9 Hare 268.

12 See the Misrepresentation Act 1967 s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801.

13 See *ibid* s 3 (substituted by the Unfair Contract Terms Act 1977 s 8(1)). See also *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495; and SALE OF LAND vol 42 (Reissue) PARA 116.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### **957. Factors determining whether purchaser entitled to compensation.**

Similar principles to those determining whether a vendor is entitled to specific performance<sup>1</sup> apply where a purchaser seeks to enforce against a vendor specific performance with compensation of a contract of sale which contains a condition for compensation<sup>2</sup>, except that in such case the rule as to strict construction does not apply, but the condition is interpreted according to the ordinary rules of construction<sup>3</sup>. Specific performance with compensation is accordingly granted where there is a misstatement in the particulars<sup>4</sup>, and even, in some cases, where the purchaser knew of the inaccuracy of the statement<sup>5</sup>.

Compensation may, however, be refused on the ground that the misstatement or omission does not affect the value of the property<sup>6</sup>, or that the misdescription was orally corrected by the auctioneer even though the purchaser did not hear the correction<sup>7</sup>.

A purchaser's right to compensation may be abrogated by the operation of another term of the contract, for example a condition giving the vendor the right to rescind<sup>8</sup>, or by the impossibility of estimating the amount of the compensation to be paid<sup>9</sup>.

1 As to the principles for determining whether a vendor is entitled to specific performance see PARA 956 ante.

2 As to conditions for compensation see SALE OF LAND vol 42 (Reissue) PARA 111.

3 *Cordingley v Cheeseborough* (1862) 4 De GF & J 379 at 384 per Lord Westbury LC. See *White v Cuddon* (1842) 8 Cl & Fin 766, HL; *Debenham v Sawbridge* [1901] 2 Ch 98 (a defect of title is not 'an error or misstatement in the particulars of sale'); *Re Jackson and Haden's Contract* [1905] 1 Ch 603 (affd [1906] 1 Ch 412, CA).

4 *Painter v Newby* (1853) 11 Hare 26; *Aspinalls to Powell and Scholefield* (1889) 60 LT 595. Cf *Cordingley v Cheeseborough* (1862) 4 De GF & J 379; *Earl of Durham v Legard* (1865) 34 Beav 611; *Re Hurlbalt and Chaytor's Contract* (1888) 57 LJ Ch 421.

5 *Lett v Randall* (1883) 49 LT 71. Cf *Cobbett v Locke-King* (1900) 16 TLR 379.

6 *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA. Cf *Re Ward and Jordan's Contract* [1902] 1 IR 73; *Carlsh v Salt* [1906] 1 Ch 335 at 340 per Joyce J.

7 *Re Hare and O' More's Contract* [1901] 1 Ch 93, where the purchaser was given the option of rescinding or completing without compensation.

8 *Mawson v Fletcher* (1870) LR 10 Eq 212 (affd 6 Ch App 91); *Re Terry and White's Contract* (1886) 32 ChD 14, CA; *Ashburner v Sewell* [1891] 3 Ch 405; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19. Cf *Painter v Newby* (1853) 11 Hare 26; and see *Williams v Edwards* (1827) 2 Sim 78 (contract avoided if good title not shown).

9 *White v Cuddon* (1842) 8 Cl & Fin 766, HL. See also the cases cited in PARA 956 note 10 ante.

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### **958. Condition excluding compensation for misdescription.**

A clause which provides that no misdescription or omission in the particulars of sale is to annul the sale and that no compensation is to be allowed in respect of any misdescription or omission prevents a purchaser from obtaining specific performance with compensation<sup>1</sup>.

However, such a clause does not deprive the purchaser of the right to rescind the contract and recover his deposit if it may reasonably be supposed that, but for the misdescription or omission, he might never have entered into the contract<sup>2</sup>, and the misdescription or omission relates to a matter which is within the vendor's knowledge<sup>3</sup>, even though the vendor does not regard it as a matter of importance<sup>4</sup>. The same principle applies to clauses excluding liability for pre-contract misrepresentation<sup>5</sup>. A vendor cannot by means of such a clause exclude or restrict his liability for negligence or for a pre-contract misrepresentation made by him unless the clause was a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made<sup>6</sup>.

<sup>1</sup> *Cordingley v Cheeseborough* (1862) 4 De G F & J 379; *Re Terry and White's Contract* (1886) 32 ChD 14, CA. Cf *Whittemore v Whittemore* (1869) LR 8 Eq 603; *Molphy v Coyne* (1919) 53 ILT 177. See also SALE OF LAND vol 42 (Reissue) PARA 115.

<sup>2</sup> *Flight v Booth* (1834) 1 Bing NC 370 at 377 per Tindal CJ. See also SALE OF LAND vol 42 (Reissue) PARA 51 note 2.

<sup>3</sup> *Heywood v Mallalieu* (1883) 25 ChD 357; *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261 (affd (1886) 16 QBD 778, CA); *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963. Cf *Beyfus v Lodge* [1925] Ch 350, where specific performance was refused on the ground of misdescription but the purchaser's claim for rescission was dismissed.

<sup>4</sup> *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495.

<sup>5</sup> *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128; *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495.

<sup>6</sup> See the Misrepresentation Act 1967 s 3 (substituted by the Unfair Contract Terms Act 1977 s 8(1)); and *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495. See also the Unfair Contract Terms Act 1977 ss 2(2), 11. As to the validity of exclusion clauses generally see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL. See also MISREPRESENTATION AND FRAUD vol 31 paras 803, 828.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(6) DAMAGES WITH OR INSTEAD OF SPECIFIC  
PERFORMANCE/959. Damages in equity.

## **(6) DAMAGES WITH OR INSTEAD OF SPECIFIC PERFORMANCE**

### **959. Damages in equity.**

Where a court has jurisdiction<sup>1</sup> to entertain an application for an injunction or specific performance, it may award damages in equity in addition to or in substitution for an injunction or specific performance<sup>2</sup>. If specific performance is impossible or is refused the plaintiff will usually be entitled to damages at law for breach of contract<sup>3</sup> and will not need to claim equitable damages, but equitable damages can be claimed in some cases where damages at law cannot be recovered<sup>4</sup> or in circumstances where the court would not normally exercise its discretion to grant specific performance<sup>5</sup>. However, equitable damages cannot be awarded if the court has no jurisdiction to order specific performance<sup>6</sup> and, like any other equitable remedy, the award of damages is presumably subject to equitable considerations such as delay, mistake, acquiescence and unconscionable conduct<sup>7</sup>.

It has been held that there is no jurisdiction to award equitable damages in respect of a contract of loan<sup>8</sup> or agency<sup>9</sup> or a partnership agreement<sup>10</sup>. Damages have also been refused where specific performance was impossible because the subject matter of the contract had been disposed of before the commencement of the action<sup>11</sup>, or where the right to specific performance had been extinguished by laches<sup>12</sup>. Equitable damages cannot be awarded where there is no concluded agreement<sup>13</sup> or where the plaintiff by his own act has rendered specific performance impossible<sup>14</sup>. Equitable damages can, however, be awarded where specific performance has become impossible because the subject matter of the contract has been disposed of between the commencement of the action and the hearing<sup>15</sup> or where during that time the contract sued upon has been actually performed<sup>16</sup>. The power to grant equitable damages is a discretionary remedy; thus acquiescence may induce the court to refuse both damages and specific performance, while a lesser degree of acquiescence may induce the court to refuse specific performance but grant equitable damages<sup>17</sup>.

An award of damages for breach of part of a contract may be coupled with an order for specific performance of the rest of the contract<sup>18</sup>.

Where the statement of claim does not contain a claim for equitable damages the court may give leave for the statement of claim to be amended to include such a claim<sup>19</sup>. This is, perhaps, not strictly necessary for in some cases the court has awarded damages in lieu of specific performance even though there was no claim for equitable damages in the pleadings<sup>20</sup>. If there is no claim for specific performance in the pleadings it has been observed that there are obvious difficulties in awarding damages as a substitute for what is not claimed<sup>21</sup>, but it now appears that a claim for specific performance is not vital provided it is made clear that damages are being claimed<sup>22</sup> in substitution for the equitable remedy<sup>23</sup>.

1 'Jurisdiction' includes powers: Supreme Court Act 1981 s 151(1). The question of jurisdiction must be determined as at the date of the writ: see *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 284-285, CA, per Millett LJ.

2 Supreme Court Act 1981 s 50 (Court of Appeal and High Court). The power is extended to county courts by the County Courts Act 1984 ss 23, 38 (s 38 substituted by the Courts and Legal Services Act 1990 s 3). This power was originally conferred by the Chancery Amendment Act 1858 s 2 (Lord Cairns' Act) (repealed) and survived the repeal of that Act by the Statute Law Revision Act 1883 (repealed): *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL. Damages under this power are referred to as equitable damages to

distinguish them from damages at law awarded for breach of contract. For a history of the remedy see generally McDermott, *Equitable Damages* (1994). See also *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

3 Apart from an action in contract, it is sometimes possible to bring an action for damages in tort. Thus there may be a claim in deceit if there has been a fraudulent misrepresentation, or a claim under the Misrepresentation Act 1967 if there has been an innocent misrepresentation.

4 Damages in equity may be claimed, for example, where the action was begun before the contractual date for completion: see *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667.

5 *Tamplin v James* (1880) 15 ChD 215, CA; *McKenna v Richey* [1950] VLR 360, [1950] ALR 778 (Vict). Cf *Lavery v Pursell* (1888) 39 ChD 508 at 519 per Chitty J.

6 It has been stated that for this purpose the court has no jurisdiction to entertain an action for specific performance if the contract is of a class of contracts of which the court, acting on accepted principles, would not in any circumstances decree specific performance: *Price v Strange* [1978] Ch 337 at 369, [1977] 3 All ER 371 at 393, CA, per Buckley LJ, giving as examples contracts for the sale and purchase of commodities readily available upon the market at an ascertainable price and contracts for personal services. However, cf *Price v Strange* supra at 359 and at 385 per Goff LJ.

7 As to delay see EQUITY vol 16(2) (Reissue) PARA 910 et seq; as to mistake see EQUITY vol 16(2) (Reissue) PARA 439 et seq; as to acquiescence see EQUITY vol 16(2) (Reissue) PARA 909; and as to unconscionable conduct see EQUITY vol 16(2) (Reissue) PARA 416 et seq.

8 *Rogers v Challis* (1859) 27 Beav 175. It is submitted that this is not an absolute rule, for it is based on the principle that the court will not award specific performance of a contract of loan, to which it is now established that there are numerous exceptions: see PARA 834 ante.

9 *Chinnock v Sainsbury* (1860) 30 LJ Ch 409.

10 *Scott v Rayment* (1868) LR 7 Eq 112. See PARA 836 ante.

11 *Ferguson v Wilson* (1866) 2 Ch App 77 (contract to allot shares; shares allotted to third persons before commencement of action).

12 *Lavery v Pursell* (1888) 39 ChD 508. But see *McKenna v Richey* [1950] VLR 360, [1950] ALR 778 (Vict).

13 *Lewers v Earl of Shaftesbury* (1866) LR 2 Eq 270 (affd (1867) 16 LT 135); *Stimson v Gray* [1929] 1 Ch 629.

14 *Hipgrave v Case* (1885) 28 ChD 356, CA.

15 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also *Davenport v Rylands* (1865) LR 1 Eq 302 at 307 per Wood V-C; *Ferguson v Wilson* (1866) 2 Ch App 77 at 91 per Cairns LJ.

16 *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237.

17 *Sayers v Collyer* (1884) 28 ChD 103 at 110, CA, per Fry LJ.

18 *Soames v Edge* (1860) John 669; *London Corpn v Southgate* (1868) 38 LJ Ch 141.

19 *Surrey County Council v Bredero Homes Ltd* [1992] 3 All ER 302 at 315; affd [1993] 3 All ER 705, [1993] 1 WLR 1361, CA.

20 *Wedmore v Bristol Corpn* (1862) 7 LT 459; *Catton v Wyld* (1863) 32 Beav 266 at 268; *Betts v Neilson, Betts v De Vitre* (1868) 3 Ch App 429 at 441; *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616 at 621.

21 See *Horsler v Zorro* [1975] Ch 302 at 307, [1975] 1 All ER 584 at 588 per Megarry J. In Australia and Canada, however, it seems that damages can be awarded even though there is no claim for specific performance but the circumstances are such that that remedy could have been claimed: *Masai Minerals Ltd v Heritage Resources Ltd* (1979) 95 DLR(3d) 488 at 494; affd (1981) 119 DLR(3d) 393; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245.

22 Ie under the Supreme Court Act 1981 s 50: see the text and notes 1-2 supra.

23 *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA (a case on injunctions to which the same principles apply).

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **959 Damages in equity**

NOTES 1, 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(6) DAMAGES WITH OR INSTEAD OF SPECIFIC PERFORMANCE/960. The measure of damages.

## 960. The measure of damages.

Where the court has jurisdiction to award damages either at law or in equity, the measure of damages and the date at which they are to be assessed are the same in either case. The general principle is that the innocent party is entitled to be placed, so far as money can do so, in the same position as if the contract had been performed<sup>1</sup>. Prima facie the measure of damages will be the 'loss of bargain', that is, the extent to which the market value of the property in question exceeds the contract price (if the claimant is the purchaser) or falls short of it (if the claimant is the vendor)<sup>2</sup>. It is irrelevant that the purchaser wishes to acquire the property for personal occupation and not for resale<sup>3</sup>. If it is more beneficial to him, the innocent party can claim instead to be put in the same position as if the contract had never been made, by being reimbursed for expenditure (including pre-contract expenditure) which it was within the contemplation of the parties that he would incur and which has been wasted as a result of the breach<sup>4</sup>. If he has incorrectly represented that he has power to sell the property, he may be liable for damages for misrepresentation even if damages for loss of bargain cannot be claimed for breach of contract<sup>5</sup>.

Where damages are awarded in lieu of specific performance, the principle that damages should be assessed as at the date of the breach of contract (which is the usual rule in relation to commercial contracts) does not normally apply<sup>6</sup>. The selection of the appropriate date is a matter for the court's discretion, but the date usually chosen is the date at which the remedy of specific performance ceases to be available. Thus damages have been ordered to be assessed as at the date on which it ceased to be within the vendor's power to convey the property<sup>7</sup>, as at the date on which the purchaser elected to abandon his claim to specific performance<sup>8</sup>, and as at the date of judgment<sup>9</sup>. If the purchaser has been guilty of delay in pursuing his claim, assessment may be directed as at an earlier date<sup>10</sup>.

In calculating the damages due to a vendor, credit must be given for any deposit which has been forfeited<sup>11</sup>.

Any claim to damages must be limited to the loss which is reasonably foreseeable as arising from the breach, either in the ordinary course of things or because of special circumstances known to the party committing the breach<sup>12</sup>. For this purpose, special circumstances are necessary to justify imputing to a vendor of land knowledge that the purchaser intends to use it in any particular manner<sup>13</sup>.

1 *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895, HL, per Lord Wilberforce; *Suleman v Shahsavari* [1989] 2 All ER 460, [1988] 1 WLR 1181; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA. As to the measure of damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARA 1128 et seq. See also the following cases on damages in lieu of an injunction: *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993; *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922. The method of assessment in *Wrotham Park Estate Co v Parkside Homes Ltd* supra was doubted in *Wrotham Park Settled Estates v Hertsmere Borough Council* [1993] 2 EGLR 15, CA; and see *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA. *Wrotham Park Estate Co v Parkside Homes Ltd* supra was, however, approved and applied in *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

2 See SALE OF LAND vol 42 (Reissue) PARA 258. The rule in *Bain v Fothergill* (1874) LR 7 HL 158, which limited the damages recoverable where a contract was defeated by the vendor's failure to show a good title, was

abolished by the Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 5(3), (4)(a) in respect of contracts made on or after 27 September 1989.

3 *Ridley v De Geerts* [1945] 2 All ER 654, CA.

4 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535; *Anglia Television Ltd v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA. See also *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, [1951] ALR 771 (Aust HC), where the costs of searching for a non-existent subject matter of the contract were held to have been reasonably incurred. Where the vendor fails to complete but the purchaser cannot prove any damages by way of loss of bargain, he may (in addition to recovering his deposit) recover interest on the deposit and the costs of approving and executing the contract, investigating title, searching and preparing the conveyance: *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225.

5 See the Misrepresentation Act 1967 s 2(1); *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528; *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801; and SALE OF LAND vol 42 (Reissue) PARA 259.

6 See SALE OF LAND vol 42 (Reissue) PARA 260.

7 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also *Techno Land Improvements Ltd v British Leyland (UK) Ltd* (1979) 252 Estates Gazette 805; *Ricci v Masons (a firm)* [1993] 2 EGLR 159.

8 *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA.

9 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA. See also *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406.

10 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA.

11 *Shuttleworth v Clews* [1910] 1 Ch 176. As to the statutory power to order the return of the deposit see PARA 947 ante.

12 See *Hadley v Baxendale* (1854) 9 Exch 341; and DAMAGES vol 12(1) (Reissue) PARA 1128 et seq.

13 *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583, applying *Hadley v Baxendale* (1854) 9 Exch 341. Cf *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753, where the vendor knew of the purchaser's intention to develop the property and damages were assessed on that footing.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
PROCEEDINGS FOR SPECIFIC PERFORMANCE/(6) DAMAGES WITH OR INSTEAD OF SPECIFIC  
PERFORMANCE/961. Election between remedies.

### **961. Election between remedies.**

A plaintiff claiming specific performance or damages in the alternative<sup>1</sup> may, before the trial, elect to accept the repudiation of the contract by the defendant and abandon the claim to specific performance, by communicating his election to the defendant or by other acts showing an unequivocal election to terminate the contract<sup>2</sup>. The right of election will cease, however, if the defendant remedies the breach before the plaintiff accepts the repudiation and the defendant is able and willing to perform his part of the contract<sup>3</sup>; or if the breach is not of a continuing nature and the plaintiff with full knowledge of the breach has taken steps which show an intention to proceed with the contract<sup>4</sup> or has delayed in exercising his right to terminate the contract<sup>5</sup>. The plaintiff must in any event elect at the trial between his claim to specific performance and his claim to damages<sup>6</sup>.

If the plaintiff elects at the trial to claim specific performance but the defendant fails to comply with the court's directions for performance of the contract, the plaintiff must apply to the court for an order discharging the contract and cannot terminate the contract himself by treating the defendant's continued non-performance as a repudiation of the contract<sup>7</sup>. A plaintiff who has obtained an order for the discharge of the contract is entitled to the same relief by way of damages and otherwise as if he had accepted a repudiation of the contract by the defendant prior to the trial<sup>8</sup>.

1 As to pleading alternative claims see PARA 921 ante.

2 *Scarf v Jardine* (1882) 7 App Cas 345 at 361, HL, per Lord Blackburn; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290, CA.

3 *Frost v Knight* (1872) LR 7 Exch 111 at 112, Ex Ch, per Cockburn CJ; *Halkett v Earl of Dudley* [1907] 1 Ch 590.

4 *Hain SS Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA.

5 *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 597 per Parker J, approved in *Berners v Fleming* [1925] Ch 264, CA.

6 *Farrant v Olver* (1922) 91 LJ Ch 758; *Glover v Broome* [1926] WN 46; *Johnson v Agnew* [1980] AC 367 at 392, [1979] 1 All ER 883 at 889, HL, per Lord Wilberforce; *Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 All ER 615, [1987] 1 WLR 46, CA.

7 *Halkett v Earl of Dudley* [1907] 1 Ch 590; *Austins of East Ham Ltd v Macey* [1941] Ch 338, CA; *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *GKN Distributors Ltd v Tyne Tees Fabrication Ltd* (1985) 50 P & CR 403. As to the discharge of specific performance orders see PARA 966 post.

8 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.





Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3.  
 PROCEEDINGS FOR SPECIFIC PERFORMANCE/(6) DAMAGES WITH OR INSTEAD OF SPECIFIC  
 PERFORMANCE/962. Damages in addition to specific performance.

## **962. Damages in addition to specific performance.**

In certain circumstances a plaintiff may be entitled to damages for breach of contract as well as to an order for specific performance. An agreement may be specifically enforced in part, leaving the plaintiff to his claim in damages for breach of the remainder<sup>1</sup>. Damages may be awarded for delay in completion<sup>2</sup>. Damages have also been awarded where a purchaser elected to complete a contract for the purchase of property which was charged to secure sums greater than the contract price<sup>3</sup>.

1 *Soames v Edge* (1860) John 669; *London Corpn v Southgate* (1868) 17 WR 197.

2 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667 (damages awarded where land had been conveyed to plaintiffs after issue of writ so that claim for specific performance did not fall to be considered). See also *Jaques v Millar* (1877) 6 ChD 153; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390; *Jones v Gardiner* [1902] 1 Ch 191; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770; *Ford-Hunt v Raghbir Singh* [1973] 2 All ER 700, [1973] 1 WLR 738; *Easton v Brown* [1981] 3 All ER 278 (damages for delay in complying with specific performance order); *Seven Seas Properties Ltd v Al-Essa* [1989] 1 All ER 164, [1988] 1 WLR 1272 (combination of specific performance and Mareva jurisdictions by order for retention of purchase price pending inquiry into damages).

3 *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406, where the damages were limited to the excess of the value of the property, as assessed at the date of the discharge of the mortgages, over the purchase price.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(7) RELIEF AFTER JUDGMENT/963. Settling the conveyance.

## **(7) RELIEF AFTER JUDGMENT**

### **963. Settling the conveyance.**

Unless the terms of the conveyance, lease or other instrument of transfer have already been agreed between the parties, the order will direct that the instrument be settled by the master in case the parties differ<sup>1</sup>. On giving directions<sup>2</sup> the master will give directions as to the preparation and service of the draft on the parties to be bound by it and as to the service of any objections to it<sup>3</sup>. Any matter relating to the settlement of the draft may be referred to one of the conveyancing counsel of the court<sup>4</sup>, and the master may act on that opinion, subject to the right of any party to object to it, in which event the point in dispute is determined by the judge<sup>5</sup>. When the draft has been approved, the party having the carriage of the order will engross it and the master will sign a memorandum of his approval on the front of the engrossment.

1 See *Charalambous v Ktori* [1972] 3 All ER 701, [1972] 1 WLR 951, which was decided under the old procedure for proceedings under Chancery judgments and orders: cf CIVIL PROCEDURE; TRUSTS.

2 As to directions see also PARA 938 ante.

3 RSC Ord 44 r 3(1)(c). The draft must be served on a party even if he has not acknowledged service and a default judgment has been obtained against him: *Charalambous v Ktori* [1972] 3 All ER 701, [1972] 1 WLR 951.

4 As to references to conveyancing counsel see SALE OF LAND vol 42 (Reissue) PARA 136.

5 See RSC Ord 31 rr 5-8.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(7) RELIEF AFTER JUDGMENT/964. Taking accounts.

#### **964. Taking accounts.**

If a good title is shown or title has been accepted<sup>1</sup>, it will generally be necessary to direct the taking of an account by the master to ascertain the precise amount payable to the vendor. This may involve computing and adding to or deducting from the contractual price one or more of the following: interest or rents and profits<sup>2</sup>; compensation for deterioration of the property<sup>3</sup>; compensation for misdescription or defects in title<sup>4</sup>; damages for breach of contract<sup>5</sup> or misrepresentation<sup>6</sup>; and costs<sup>7</sup>. Outgoings will also have to be apportioned<sup>8</sup>. The amount due will be stated in the master's order<sup>9</sup>, which is subject to appeal<sup>10</sup>.

1 As to proof of title see SALE OF LAND vol 42 (Reissue) PARA 137 et seq; and as to acceptance of title see SALE OF LAND vol 42 (Reissue) PARAS 174-176.

2 As to interest, rents and profits see PARA 941 et seq ante. This may include an occupation rent where the vendor has remained in personal occupation: see PARA 943 ante.

3 As to deterioration see PARA 945 ante.

4 As to compensation see PARA 948 et seq ante.

5 As to damages for breach of contract see PARA 962 ante.

6 As to damages for misrepresentation see PARA 956 ante.

7 As to costs see PARA 940 ante.

8 As to outgoings see SALE OF LAND vol 42 (Reissue) PARAS 125-126.

9 As to the master's order see RSC Ord 44 r 11; and PARA 938 ante.

10 See RSC Ord 44 r 12; and PARA 938 ante.

#### **UPDATE**

#### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(7) RELIEF AFTER JUDGMENT/965. Enforcement of the order.

### **965. Enforcement of the order.**

If the defendant fails to comply with the master's directions for completion, the plaintiff cannot immediately proceed to execution but must apply for a further order directing the defendant to complete<sup>1</sup>. The further order should specify the time within which the defendant must comply<sup>2</sup>. If a copy of the order, indorsed with a penal notice, has been served personally on the defendant and the defendant fails to comply with it, non-compliance will be a contempt of court and the plaintiff may enforce the order by applying for leave to issue a writ of sequestration or for an order for committal against the defendant<sup>3</sup>.

It is, however, usually possible to enforce an order for specific performance without resort to proceedings for contempt. In a vendor's action, the order may be enforced by one or more of the various forms of execution available for enforcement of a money judgment<sup>4</sup>. In a purchaser's action for specific performance of a contract concerning any interest in land or for the sale or exchange of any interest in land, the purchaser may apply to the court for a declaration that the vendor is a trustee of the interest and for a vesting order vesting that interest in the purchaser or, if it is more convenient, for the appointment of some person to convey the land or any interest in it to the purchaser<sup>5</sup>.

Alternatively, where the High Court has made an order directing a person to execute any conveyance, contract or other document and that person neglects or refuses to comply with the judgment or order or cannot after reasonable inquiry be found, the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document be executed by such person as the court may nominate for the purpose<sup>6</sup>. An order vesting property or directing or authorising some person to assign or convey may be made by a master<sup>7</sup>.

An order for the delivery of any goods which does not give the person against whom the order is made the alternative of paying the assessed value of the goods may be enforced by a writ of specific delivery<sup>8</sup>.

If an order for specific performance of a contract is not complied with, the court may direct that the act required to be done may, so far as practicable, be done by the party by whom the order was obtained or some other person appointed by the court, at the cost of the disobedient party<sup>9</sup>.

An unpaid vendor is entitled to a lien over the property for the balance of the purchase price, which he can enforce by obtaining a court order for sale of the property<sup>10</sup> and, where appropriate, an order for the appointment of a receiver pending sale<sup>11</sup>. The court may give the vendor leave to bid at the sale<sup>12</sup>.

If there is long delay in seeking to enforce an order for specific performance, the court will refuse to direct the enforcement of the order if the plaintiff does not give a sufficient explanation of the delay and the defendant has suffered some detriment as a result of it<sup>13</sup>. Where the plaintiff has suffered damage as a result of the defendant's delay in complying with an order for specific performance, the court can direct a supplementary inquiry as to the amount of such damages and order payment of that amount to the plaintiff<sup>14</sup>.

1 See *Morgan v Brisco* (1886) 32 ChD 192; *Palmer v Lark* [1945] Ch 182 at 184, [1945] 1 All ER 355 at 356.

2 RSC Ord 42 r 2. See *Liemann v Rightside Properties Ltd* (1973) 229 Estates Gazette 1347.

3 See RSC Ord 45 rr 5, 7. In the case of a corporate defendant, a writ of sequestration or order for committal may also be sought against a director or other officer of the corporate body on whom a copy of the order indorsed with a penal notice has been served: see CONTEMPT OF COURT.

4 See RSC Ord 45 r 1; and CIVIL PROCEDURE.

5 See the Trustee Act 1925 ss 48, 50; *Wellesley v Wellesley, Mornington v Mornington, ex p Countess of Mornington* (1853) 4 De GM & G 537; *Hall v Hale* (1884) 51 LT 226. The procedure under the Trustee Act 1925 cannot be used to create an obligation binding on the defendant, such as a lessor's covenant for quiet enjoyment: *Cowper v Harmer* (1887) 57 LJ Ch 460. See further TRUSTS.

6 Supreme Court Act 1981 s 39(1); and see *Mir v Mir* [1992] Fam 79, [1992] 1 All ER 765. Unlike the power under the Trustee Act 1925 (see note 5 supra), this power is not restricted to contracts concerning interests in land. A conveyance, contract, document or instrument executed under the Supreme Court Act 1981 s 39(1) operates as if it had been executed by the person originally directed to execute it: s 39(2). For a form of summons for the appointment of a person to convey see Court Forms. Before making an order under this provision, the court ought to satisfy itself that there has been a neglect or refusal to execute the document, and ought not to make an anticipatory order unless the party in question has already shown by his conduct that he will refuse to execute: *Savage v Norton* [1908] 1 Ch 290 at 297 per Parker J, decided under earlier corresponding legislation.

7 As to the jurisdiction and powers of Chancery masters see RSC Ord 32 r 14; *Practice Direction (Chancery Division)* 13, Supreme Court Practice vol 2 para 854; and CIVIL PROCEDURE vol 11 (2009) PARA 10.

8 RSC Ord 45 r 4(1).

9 RSC Ord 45 r 8. The expenses incurred may be ascertained in such manner as the court may direct, and execution may issue against the disobedient party for the amount so ascertained and for costs: Ord 45 r 8.

10 *Munns v Isle of Wight Rly Co* (1870) 5 Ch App 414; *Lycett v Stafford and Uttoxeter Rly Co* (1872) LR 13 Eq 261; *Williams v Aylesbury and Buckingham Rly Co* (1873) 28 LT 547. For a form of notice of motion by a vendor for an order for sale to enforce his lien see Court Forms. See further LIEN vol 68 (2008) PARA 880.

11 *Munns v Isle of Wight Rly Co* (1870) 5 Ch App 414; *Ware v Aylesbury and Buckingham Rly Co* (1873) 28 LT 893. As to the appointment of a receiver see RECEIVERS vol 39(2) (Reissue) PARA 330.

12 *Lycett v Stafford and Uttoxeter Rly Co* (1872) LR 13 Eq 261; *Ware v Aylesbury and Buckingham Rly Co* (1873) 28 LT 893.

13 *Easton v Brown* [1981] 3 All ER 278, where there was a seven-year delay but a stay of proceedings was refused because the plaintiff had acted reasonably and the defendant had suffered no detriment. See also *McKenna v Richey* [1950] VLR 360, [1950] ALR 778 (Vict).

14 *Ford-Hunt v Raghbir Singh* [1973] 2 All ER 700, [1973] 1 WLR 738; *Easton v Brown* [1981] 3 All ER 278.

## UPDATE

### 906-1000 Proceedings for Specific Performance

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 965 Enforcement of the order

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(7) RELIEF AFTER JUDGMENT/966. Discharge of the order.

### **966. Discharge of the order.**

If the defendant fails to comply with an order for specific performance and the plaintiff no longer wishes to obtain specific performance or it has become impossible, the plaintiff is not entitled to treat the contract as having been terminated; he must apply to the court for an order discharging the contract<sup>1</sup>. The court's directions supersede the provisions of the contract, so that, for example, after an order for specific performance has been made neither party may serve on the other a completion notice purporting to make time of the essence of the contract<sup>2</sup>. The defendant may also apply for the discharge of the order if the plaintiff has failed to comply with the time-limit fixed by the court or is otherwise unable or unwilling to fulfil his obligations<sup>3</sup>.

The court will not make an order for the discharge of the contract if it would be unjust to do so<sup>4</sup>. Where the innocent party gives notice that he proposes to ask the court to permit him to rescind the contract on the ground of the other party's repudiatory breach, the essential question which the court must ask itself is whether in the circumstances as they obtained at the date when the notice was given, it would be unconscionable for the innocent party to exercise his legal right to treat himself as discharged by the other's breach. If so, it would be unjust to deny him his contractual right and the decree of specific performance will be discharged<sup>5</sup>. If the ground of the application is that the vendor has failed to show a good title, the court may refuse to discharge the contract if the defect has been cured before the hearing<sup>6</sup>. A conditional order may be made directing that the contract be discharged if the party in default does not complete it within some specified time<sup>7</sup>.

Until a specific performance order is made, a party who has committed a repudiatory breach of contract may escape liability if before the repudiation has been accepted by the innocent party an event occurs which makes it impossible for the innocent party to perform his own obligations under the contract<sup>8</sup>. This rule does not, however, apply after a specific performance order has been made, because in such a case the plaintiff is no longer free to accept the repudiation at his own discretion. Consequently, if after a specific performance order has been made an event occurs, without fault on the part of the plaintiff, which makes it impossible for him to complete the contract (for example a sale of the subject matter of the contract by the plaintiff's mortgagee at a time when the plaintiff cannot raise the money to discharge the mortgage), the defendant cannot rely on the plaintiff's inability to complete the contract as a defence to a claim for damages<sup>9</sup>.

A party who has obtained an order for the discharge of the contract because of the other party's breach of contract or failure to comply with the court order is entitled to the same relief as if he had elected to accept a repudiation of the contract by the other party<sup>10</sup>.

1 *Halkett v Earl of Dudley* [1907] 1 Ch 590; *Austins of East Ham Ltd v Macey* [1941] Ch 338, CA; *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *GKN Distributors Ltd v Tyne Tees Fabrication Ltd* (1985) 50 P & CR 403.

2 *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817; *GKN Distributors Ltd v Tyne Tees Fabrication Ltd* (1985) 50 P & CR 403. As to notices to complete see SALE OF LAND vol 42 (Reissue) PARA 121.

3 *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817.

4 *Johnson v Agnew* [1980] AC 367 at 399, [1979] 1 All ER 883 at 895, HL, per Lord Wilberforce.

5 *Hillel v Christoforides* (1991) 63 P & CR 301.

6 *Coffin v Cooper* (1807) 14 Ves 205; *Hume v Pocock* (1866) 1 Ch App 379; *Halkett v Earl of Dudley* [1907] 1 Ch 590.

7 *Foligno v Martin* (1853) 16 Beav 586; *Simpson v Terry* (1865) 34 Beav 423.

8 *Avery v Bowden* (1856) 6 E & B 953 at 962, Ex Ch.

9 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

10 As to damages see PARA 959 et seq ante; and as to repayment or forfeiture of the deposit see PARAS 946-947 ante.

## **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966 Discharge of the order**

NOTES 1-3--See also *Ahmed v Wingrove* [2007] EWHC 1777 (Ch), [2007] 31 EG 81 (CS).



Halsbury's Laws of England/SPECIFIC PERFORMANCE (VOLUME 44(1) (REISSUE))/3. PROCEEDINGS FOR SPECIFIC PERFORMANCE/(7) RELIEF AFTER JUDGMENT/967-1000. County court proceedings after judgment.

### **967-1000. County court proceedings after judgment.**

The rules relating to proceedings under Chancery judgments in the High Court<sup>1</sup> apply to proceedings under a judgment or order given or made by a county court in the exercise of its equity jurisdiction<sup>2</sup>. If an account has to be taken or inquiry made it must be taken or made by the district judge<sup>3</sup>. The proper officer fixes the day for the proceedings and gives notice to all parties entitled to attend<sup>4</sup>.

An order for specific performance may be enforced by committal<sup>5</sup>. An order made in a vendor's action may be enforced by any of the various forms of execution available for the enforcement of an order for the payment of money<sup>6</sup>. The county court has the same jurisdiction<sup>7</sup> as the High Court to make a vesting order or appoint a person to convey land to a purchaser<sup>8</sup>.

Any order made takes effect as a final order disposing of the cause or matter which can be challenged only by an appeal to the judge<sup>9</sup>.

1 le RSC Ord 44: see PARA 963 et seq ante.

2 CCR Ord 23 r 2(1). As to the service of notice of judgment on non-parties see Ord 23 r 1; and cf COURTS.

3 CCR Ord 23 r 2(3). Order 19 r 13(a) (place of inquiry); r 13(d) (inquiry conducted as if action); and r 13(e) (district judge to have most powers of judge), apply to such proceedings as if there had been a reference to the district judge for inquiry and report: Ord 23 r 2(3). As to references for inquiry and report see COURTS.

4 CCR Ord 23 r 2(2).

5 See CCR Ord 29 r 1; and COURTS.

6 See CCR Ords 25-32; and COURTS.

7 le under the Trustee Act 1925 ss 48, 50: see PARA 965 ante.

8 As to vesting orders see TRUSTS vol 48 (2007 Reissue) PARA 869 et seq. The county court has no power corresponding to the power of the High Court under the Supreme Court Act 1981 s 39 (see PARA 965 ante).

CCR Ord 23 r 3.

### **UPDATE**

### **906-1000 Proceedings for Specific Performance**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **967 County court proceedings after judgment**

NOTE 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

